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Legal Gazette

REPORTS OF CASES

DECIDED IN THE

UNION

SUPPLEMENT.

1. The decision in *Commonwealth v. Allen et al.*, page 408, was reversed in the Supreme Court of Pennsylvania, upon February 12th, 1872. Opinion reported in *Legal Gazette* of February 16th, 1872.
2. In the decision of Judge McKennan, in *Thompson and Salt Manufacturing Co. v. Jewett*, reported in *Legal Gazette* of February 16th, 1872, reference is made to *Salt Manufacturing Co. v. Thomas & Barry*, page 275.

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1872.

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Legal Gazette

REPORTS OF CASES

DECIDED IN THE
UNITED STATES CIRCUIT COURT FOR THE EASTERN DISTRICT OF
PENNSYLVANIA; THE SUPREME COURT OF PENNSYLVANIA
AT NISI PRIUS; THE DISTRICT COURT, COURTS OF
COMMON PLEAS, QUARTER SESSIONS, OYER
AND TERMINER AND ORPHANS' COURTS
OF PHILADELPHIA;

AND IN THE COURTS OF THE
THIRD, EIGHTH, NINTH, ELEVENTH, TWELFTH, ~~TWENTY-SIXTH~~,
TWENTY-EIGHTH, AND TWENTY-NINTH JUDICIAL
DISTRICTS OF PENNSYLVANIA.

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P R E F A C E .

Owing to the great difficulty in obtaining a complete file of the Legal Gazette, consequent upon many of its numbers having been exhausted, and in order to satisfy the repeated requests to publish in book form its reports of decisions in the Philadelphia courts, it has been determined to commence the LEGAL GAZETTE REPORTS, the volumes of which are to be issued from time to time as may be required.

The present volume, the first of the series, contains reports of cases decided in the federal, state and city courts in Philadelphia, and the courts of several of the judicial districts of Pennsylvania. All of these cases appeared in the columns of the Legal Gazette, from its first issue, July 2d, 1869, until January 5th, 1872, inclusive. With the exception of a very few (more fully reported here than elsewhere), none of them have been published in any other volumes of reports. Many of them were reported exclusively in the Gazette. A large number of cases which originally appeared in that journal, having been republished elsewhere, have been omitted from this volume, in order to prevent unnecessary reference to two distinct series of reports.

The decisions selected embrace a great variety of topics, concerning matters of law and practice in Pennsylvania courts, the titles City of Philadelphia, Construction of Wills, Equity, Equity Practice, Guardians, Orphans' Court Practice and Practice being particularly full; while upon the titles Admiralty, Alderman, Criminal Law, Criminal Practice, Husband and Wife, Landlord and Tenant, Patents, Railroad Companies, Streets, and many others, there is much valuable information.

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Want of space has compelled the omission of many interesting opinions delivered in the judicial districts outside of Philadelphia, but in subsequent volumes it is intended to supply the deficiency in this respect.

The syllabuses to the opinions are for the most part the same as those originally published with them, with such alterations, corrections and additions as seemed advisable.

The cases have been arranged according to the dates of their delivery, the editor believing that to be the most convenient form. In two instances, *Commonwealth v. Schoeppe* and *Otterson et al. v. Middleton*, owing to the importance of the causes and the general interest which they awakened, the charges to the jury are given in full. An Index, Table of Cases, and List of Judges with their opinions, have been added. With these additions, it is hoped that the volume will prove acceptable to the profession.

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LEGAL GAZETTE REPORTS.

Court of Common Pleas, Philadelphia County.

IN EQUITY.

GREAVES v. GAMBLE.

1. An agreement for the purchase of real estate vests an equitable estate in the purchaser. He bears the losses happening and is entitled to the benefits accruing between the dates of purchase and consummation.
2. When there is a slip in the time of payment and the case admits of compensation, equity, here as elsewhere abhors a forfeiture.

Opinion by BREWSTER, J. Delivered June 26th, 1869.

This is a demurrer to a bill for specific performance. Prior to February, 1863, the plaintiff owned the property described in the bill. It was sold from him by the sheriff. The parties claiming through the sheriff's title agreed to transfer all their interest in the land to any person the plaintiff might nominate upon payment of their claim. The plaintiff nominated the defendant, and the property was conveyed to him for \$1,550, paid as follows: \$250 of the plaintiff's money, and the balance in a mortgage. The defendant thereupon entered into written articles with the plaintiff by which plaintiff agreed to pay \$40 per month rent, and if, within five years and not longer, the rents with other payments discharged the mortgage, ground-rent, taxes, &c., then the defendant was to convey to the plaintiff.

The bill charges that plaintiff has expended in repairs, &c., \$640; that he has paid defendant \$880; has offered to pay him all the money due, and has requested a conveyance, but that the defendant has refused to perform the agreement. The defendant has demurred to every section, and also to the prayer. His objections may be thus stated:

I. That time is the essence of this contract, and that the bill does not aver a performance on the part of the plaintiff within the five years named in the agreement.

II. That the bill is also defective in not averring that the plaintiff tendered a sufficient sum, or that the moneys paid were on account of this agreement.

The bill might, perhaps, have averred the time and the circumstances of the tender with greater particularity, but, we think, sufficient is herein disclosed to require an answer from the defendant.

Whether time is or is not the essence of the contract, has been a *questio vexata* in almost every case for specific performance. In *Gregson v. Riddle*, cited in 7 Ves. 268, Lord Thurlow intimated that no stipulation, however express, could avail to hold a party to the day named. It is unreported, save as cited by Sir Samuel Romilly, in *Seton v. Slade*, 7 Ves. 265, but must have been a well-considered case, for the bill was before two chancellors, and when Mr. Mansfield, for the defendant, answered the suggestion above quoted by saying that this was contrary to the intention of the parties, and that it "would be necessary to insert a clause that, notwithstanding the decision of the Court of Chancery, it *should* be void," Lord Thurlow remarked, "that such a clause might be inserted, and the parties would be just as forward as they were then."

Lord Loughborough, however, in *Lloyd v. Collet*, 4 Bro. C. C. 469, decided the other way, and Lord Eldon, in *Seton v. Slade*, 7 Ves. 265, whilst he did not doubt, did not expressly affirm *Gregson v. Riddle*. The cases down to 1815, are all reviewed by Chancellor Kent, in *Benedick v. Lynch*, 1 Johns. Ch. Rep. 370. There the bill was filed three years too late, and was, of course, dismissed. In *Hipwell v. Knight*, 1 Younge & Collyer's Exchequer Rep., Baron Alderson regarded time as of the essence wherever its efflux affected values, as in cases of stock, and wherever there was a special and known object in view, as purchasing a house for a residence. He regarded the contract then before him as falling within the rules stated, because of an express provision releasing the defendant if the other party make default, and because the defendant was guarantee of a tenant's solvency up to a certain date. He, however, declined to give judgment upon that point, and rested his decision upon the ground of waiver (p. 418).

In *Wells v. Maxwell*, 33 Law Jnl. Ch. 44; 32 Beav. 408, specific performance was decreed although the agreement contained an express clause that "time should be considered as of the essence of the contract," and although the plaintiff had not complied by the day named, or indeed within the month mentioned in a subsequent notice, formally warning him that upon its expiration, "*the contract would be treated as void.*" Lord Justice Knight Bruce said, "it has for many generations become the settled practice of this court in cases of specific performance of contracts to buy land, to disregard to a great extent the provisions made by such contracts as to the time of settlement, subject, however, to this, that where there is any special provision on the subject, beyond the mere mention of a time for a completion, or where there has been gross delay or other misconduct, or there are other circumstances of a special and extraordinary kind, then the court will interfere, because it does not allow men to dis-

regard wholly the convenience of others, and to take exactly such time as might please themselves with regard to the performance of their contracts."

On the other hand, in the later case of *Lord Ranelagh v. Melton*, 1865, 34 Law J., Chanc. 277; 2 Drewry & Small, 278, Vice Chancellor Kindersley drew the distinction between contracts establishing the relation of vendor and purchaser, where the parties are not bound to the day, and an agreement whereby this relation is to be established upon the performance of a specific act. Acting upon this refinement, he held that the purchase money in that case should have been paid upon the day, and dismissed the bill because the draft conveyance was forwarded eleven days too late.

In *Ahl v. Johnson*, 20 How. 511, the Supreme Court of the United States held that if the vendee entered into possession, and the vendor did not formally demand the payment when due, these circumstances, with others, showed that time was not the essence of the contract, and his vendee was entitled to relief, although the tender was too late under the contract.

In *Miller et al. v. Henlan*, 1 P. F. Smith, 265, the delay of nine years barred the purchaser's right.

The weight of authority seems to be conclusive on these two points.

1st. That an agreement for the purchase of real estate vests an equitable estate in the purchaser. He bears the losses happening and is entitled to the benefits accruing between the dates of purchase and consummation. For this a large number of authorities might be cited.

2d. That when there is a slip in the time for payment and the case admits of compensation equity here as elsewhere abhors a forfeiture. On these points, see *Richter v. Selin*, 8 S. & R. 425, 440; *Sutter v. Sing*, 1 Casey, 466; *Siter's Appeal*, 2 Casey, 178; *Robb v. Mann*, 1 Jones, 300; *Russell's Appeal*, 3 Harr. 319; *Bowie v. Berry*, 3 Maryland, 359; *Edgerton v. Peckham*, 11 Paige, 352; *Falls v. Carpenter*, 1 Devereux & Balt. Eq. 237, 278.

The exceptions seem to be confined to,

1. Gross laches.
2. Inexcusable negligence.
3. A material change, during the lapse of time, affecting the rights, interests or obligations of the parties. See opinion of Story, J., in *Langworth v. Taylor*, 1 McLean, 385; 14 Peters, 172, and the cases there cited, and the opinion of Strong, J., in *Andrews v. Bell*, 6 P. F. Smith, 349. The contract in this case expired August 12th, 1868. This bill was filed October 20th, 1868. Meanwhile the defendant receives \$880, does not demand performance, and refuses a tender of all the money due.

During the whole of the five years the defendant, according to the bill, suffers the plaintiff to be in possession and to expend money upon "repairs and improvements." Surely, if the defendant had been the original owner these circumstances would close his mouth against the defence upon the efflux of time. But was he ever the holder of this title in his own right? According to the bill he did not pay one dollar of the purchase money. The plaintiff paid all of the \$250. This fact being admitted for the purpose of this argument, it follows that the defendant has been all the time trustee to the use of the plaintiff. He has expended nothing, but received \$880, and if he is liable upon the bond accompanying the mortgage (and this does not appear) he has still been offered all the money due.

If he has advanced money, the agreement would probably be construed into a mortgage, for he only holds the title upon the nomination of the plaintiff and as security. See the authorities cited, 3 Leading Cases in Eq. by Hare and Wallace, 625, 626. And, if so, no language could make the mortgage irredeemable. All the cases from *Howard v. Harris*, 1 Vern. 190, recognize this as the favored principle of equity jurisprudence. But without discussing these questions it is sufficient for our present purpose that the bill does not exhibit any default on the part of the plaintiff and that the demurrer conceding all that is sufficiently averred, the plaintiff is entitled to an answer.

The demurrer is overruled.

T. K. Finletter, Esq., pro plaintiff.

Henry McIntyre, Esq., E. H. Hanson, Esq., and Daniel Dougherty, Esq., pro defendant.

[Legal Gazette, July 2, 1869, Vol. 1, p. 3.]

Court of Common Pleas, Philadelphia County.

OGDEN v. DUFFY.

A three months' notice to a tenant to quit upon March 25th, 1869, was in time if served December 25th, 1868.

Certiorari to Ald. Delaney.

Opinion by BREWSTER, J. Delivered June 26th, 1869.

The sole question to be here determined is whether a three months' notice to quit March 25th, 1869, is in time if it is served December 25th, 1868.

The decisions on the computation of time are the plague spot of the law. Lord Mansfield, in *Pugh v. Duke of Leeds*, Cowper, 714, called them "so many contradictions backwards and forwards."

In our State we have *Gosweiler's Appeal*, 3 Penna. Rep. 200, overruled by *Thomas v. Afflick*, 4 Harr. 14, and *Barber v. Chandler*, 5 Harr. 48. But the slaughtered authority rose to life

again in *Cromeliers v. Brink*, 5 Casey, 522, where the cases, English and American, were all ably reviewed by Mr. Justice Porter.

In *McGowen v. Sennett*, we had occasion to examine the authorities and to decide this very point. Our conclusion was that a notice served January 1st, to quit April 1st, was in time. It is said that in such a case the tenant is bound to remove March 31st. *Marys v. Anderson*, 2 Grant, 446. But as the day is indivisible he can keep possession until midnight, and the landlord cannot enter or bring ejectment until the next day. The notice served January 1st, relates back to the first second of that day, so that the tenant has notice all of January, February, and March. He has every minute of three months, and has no right to ask more.

The judgment is affirmed.

(Affirmed by Supreme Court in *Duffy v. Ogden*, 14 P. F. Smith, 240.)

[Legal Gazette, July 2, 1869, Vol. 1, p. 6.]

Orphans' Court, Philadelphia County.

ESTATE OF LUCY A. PACKER.

1. The jurisdiction of the Orphans' Court under the act of 1832, in the appointment of guardians for minors depends on the residence of such minors, the Orphans' Court of each county having under said act the care of minors residing in such county.
2. Where real estate belonging to a ward is situated in a county different from the residence of the ward and is to be sold, the proper practice is for the Orphans' Court having jurisdiction of the guardian to authorize the raising of the money, and it then becomes the duty of the Orphans' Court of the county within which the land is situated to make the order for the sale or mortgage of the same, the security to be approved by the court having jurisdiction of the account, of the giving of which the court ordering the sale is to be notified.

In the matter of the estate of Lucy A. Packer, a minor.

Opinion by BREWSTER, J. Delivered July 3d, 1869.

This case came before us on petition, citation, and answer. The facts as exhibited by the record may be thus stated.

In February, 1866, Frederick Leaf Smith, Esq., a very respectable member of the Reading bar, was appointed by this court guardian of the estates of Mary Catharine Zieber Packer and Lucy A. Packer, minor children of Joseph L. and Mary E. Packer, all of whom then resided in this city. The wards were then under fourteen years of age.

The guardian, Mr. Smith, on the 4th day of June, 1866, applied to the Orphans' Court of Berks county for an order to sell the interest of said minors in certain land situate in that county. After citation to the parties in interest, answer thereto, an auditor's report thereon, and upon full consideration the court, on the 13th day of August, 1866, ordered a sale of the

premises, requiring security of the guardian in the sum of \$10,000, which was duly entered.

On the 20th of September, 1866, the guardian returned to the said court that he had sold a part of the said land, an alias order was issued for the sale of the residue, the return to which was approved December 20th, 1866. And on the 22d of the same month, the said court decreed that the guardian "hold the net amount of the purchase moneys of all the sales (after deducting costs and expenses, &c.) in hand during the respective lives of Catharine Zieber and Mary E. Packer, and in trust to pay to each one annually the interest of their respective shares of the purchase money during their lives respectively, and after their decease account for the same according to law."

Subsequently to these proceedings, Lucy A. Packer arrived at the age of fourteen years. She thereupon petitioned this court for leave to choose her own guardian. Her prayer was granted, and George W. Adler having been chosen by her was duly appointed the guardian by this court.

Mr. Adler now asks us to order Mr. Smith to report the funds in his hands belonging to said minor, and "to make an order touching and concerning the same."

Mr. Smith has filed an answer in which he refers to the proceedings and decree above noted, and admits a balance in his hands of \$5,500, of which he has paid the interest to the tenants for life up to June 1st, 1869. He denies that there is any personal estate or other property in his hands belonging to said minors. He further saith, that on the 20th day of February, 1869, the tenants for life applied to the Orphans' Court of Berks county for a rescission of the order of December 22d, 1866, and for an order to pay the purchase moneys to said tenants for life upon their giving adequate security therefor. Said application is now undetermined in said court. And lastly, the respondent submits to this court that we have "no power, authority, or jurisdiction in the premises, to make any order or decree in relation to the purchase moneys in his hands as before mentioned."

As the questions argued were admitted to be novel, and especially as they presented a question of jurisdiction, we have endeavored to give the case a full and careful consideration. The respondent points us to a record which shows that a court of equal authority with ourselves has made an order upon him touching the moneys in his hands, and his counsel has argued with great ability that this is conclusive upon all persons. Independently of the decree made by the Orphans' Court of Berks county, December 22d, 1866, it is submitted that we are powerless to make any order in the premises. The simple statement of these propositions shows not only the manifest propriety but the imperious necessity of a careful examination of the entire

record and of all the arguments submitted on both sides. Lamentable, indeed, would be the situation of a trustee who should find himself exposed to the peril of disobeying the decree of one court in order that he might perform the directions of a conflicting order made by another tribunal. We shall endeavor to consider and decide this case in the light of these reflections.

Firstly, then, as to our original jurisdiction in this matter. It is not questioned, and must be conceded that this is beyond all controversy. The Act of March 29th, 1832, § 5, P. L. 191, Br. Dig. 278, § 31, directs that "The Orphans' Court of each county shall have the care of the persons of minors *resident within such county* and of their estates, and shall have power to admit such minors when and as often as there shall be occasion to make choice of guardians, and to appoint guardians for such as they shall judge too young or otherwise incompetent to make choice for themselves."

The only test of jurisdiction here given to us is *residence in the county*. Where the minors reside in the county, the Orphans' Court have express jurisdiction not only of their persons, but of their estates wherever situated. The words "within the county," are confined to the residence of the minor. The ward might have property in many other counties, or, indeed, in different States, but the proceeds of all the personalty wherever sold, and the rents of all the realty wherever collected, must be accounted for in the forum of appointment. We do not understand that this position is seriously questioned. Nor could its correctness well be doubted; for it would be monstrous to suppose that a guardian would have to file and settle a dozen different accounts in as many distinct courts, simply because the estate of the ward was scattered throughout the commonwealth. Guardians, like administrators, can receive, sue for, and recover assets wherever found within the State, without the special leave or reappointment of the courts in different counties.

These remarks do not apply to sales of realty, for such disposition of a ward's estate requires the sanction of the court of the county where the land is situated. This plainly appears in the act of March 29th, 1832, § 32, P. L. 198, Br. Dig. 289, § 104, which directs that the Orphans' Court having jurisdiction over the accounts of the executor or guardian shall, if the land is situate in another county, simply make a decree authorizing the raising of a certain sum of money, and thereupon it becomes "the duty of the Orphans' Court of the county *wherein the real estate is situated* to make an order for the sale or mortgage * * of so much * * of such real estate as shall * * be necessary to raise the specified sum, * * and such executor or guardian shall make return * * to the Orphans' Court of the county in which the real estate so sold * lies."

The security, however, is to be approved of by the court "having jurisdiction of his accounts." Br. Dig. 290, § 109. And where the purchaser pays into court, it is again to the court "having jurisdiction of the accounts." Id. § 111. Where, too, a sale is authorized under the act of 1851, Ibid. 291, § 118, it must be decreed by the court of the county. The same remark applies to partitions. Ibid. 292, § 124.

It is not, therefore, a matter of surprise, that the Price Act, of April 18th, 1853, Br. Dig. 851, § 1, confers its jurisdiction on the court "in the county where the premises shall be situated."

The proviso to the third section, which regulates the matter of security, seems to shed considerable light upon the question now before us. Where the court ordering the sale has appointed the guardian, they must take adequate security before the money is paid, but if he is "not within the court's jurisdiction, the court shall be duly notified that adequate security has been given to the court having jurisdiction over him."

As this court appointed Mr. Smith, we have the "jurisdiction over him." As he cannot be cited to file the same account in two forums, and as jurisdiction to be effectual must be exclusive, it follows that this is the only forum wherein he can ever be required to account. Before the payment of the proceeds of the sales to Mr. Smith, adequate security should have been entered in Philadelphia, and as the power of removing a trustee rests exclusively with the court that appointed him, it follows, *ex necessitate*, that there can be but one account. If the position assumed by the respondent is correct, then a ward residing in Philadelphia might be compelled to travel to Erie to cite her guardian to an account. She might, indeed, be subjected to greater hardship, for if he sold a dozen tracts, in as many different counties, she would have to perform a dozen journeys, to retain a dozen lawyers, and be subjected to the expense of a dozen audits, and perhaps a dozen appeals. Surely our system leads to no such absurdities.

The forum of appointment must be the forum of account and removal.

It is said that this conflicts with the provisions of the sixth and seventh sections of the Price Act; the former declaring that the purchase money shall be substituted for the realty, and the latter authorizing all persons "to file their accounts in the court whence their authority was derived."

As to the first, it is not necessary for us to construe the language there used, for there is at present no question of distribution before us. It might well be, that the sixth section would authorize the court of Berks county to protect the holders of liens or life estates, residing within its jurisdiction. That may all be conceded, and yet this court loses none of its control over

its own appointees. In reference to the seventh section, it might logically be urged that the words "whence their authority was derived," refer clearly to the court which appointed the trustee. The draftsman of that act was one of our most experienced lawyers, and he well understood the import of his words. He plainly foresaw that money might be paid to a guardian not appointed by the court ordering the sale. It was felt that in such a case security should be first entered, and to save this very discussion, it was wisely provided that the bond should be given to the "court having jurisdiction over him." That the court here spoken of was not the court which had ordered the sale is palpable, for otherwise the guardian would not have been described in the preceding line as "*not within its jurisdiction.*"

Here, then, it is plain that the legislator had the two courts distinctly in view. The court ordering the sale was to see to it, that the guardian *not within its jurisdiction* gave adequate security to the court having jurisdiction.

Is it supposable that in the face of this plain provision, the law should direct the account to be filed in the court not having the jurisdiction? That the bond should be in one county and the account in another.

It is therefore very plain, that the seventh section means that the account shall be filed in the court which appointed the guardian. From that forum alone was his "authority derived," and unless we reject the whole framework of the act, put its entire symmetry out of joint, and introduce all imaginable conflicts of jurisdiction, this is the only reasonable construction which the words will bear.

If these principles are correctly stated, the conclusion is easily arrived at. When Lucy A. Packer reached the age of fourteen years, she had the right to choose her own guardian. This court, in accordance with her suggestion, appointed the present petitioner. As two bodies cannot fill the same identical space at the same time, the appointment of the petitioner vacated the former decree, and the respondent ceased to be the guardian of this ward. His liability to account remained, his power to hold or manage was gone.

His successor in the trust has the clear right to an account.

This is all we decide, and in determining this, we in nowise trench upon the jurisdiction of the learned and able judge who made the orders in the Orphans' Court of Berks county as above recited.

And now, July 3d, 1869, it is ordered that the respondent file an account within thirty days, of all the estate of Lucy A. Packer which may have come into his hands.

Court of Common Pleas, Philadelphia County.

HANBEST v. DONNELLY.

A judgment of non-pros. for want of a narr. cannot be entered pending exceptions to bail, of which the defendant has had notice.

Rule to strike off non-pros.

Opinion by PEIRCE, J.

The defendant filed an appeal from the judgment of an alderman, and the plaintiff filed exceptions to the bail, and gave notice to the defendant to bring in the bail to justify. The counsel for the defendant promised to do so, but did not, and in a year after a non-pros. was entered by defendant, under rule of court for want of a narr. The plaintiff now moves to strike off the non-pros. as having been entered irregularly and illegally, pending the exceptions to the bail. It appears to be settled practice, that a non-pros. can never be signed, unless bail be filed as of the term wherein the process is returnable. And that a judgment of non-pros. cannot regularly be signed pending an injunction. 1 Tidd's Practice, 414, 415. The exception to bail acts as a stay until the bail justify, or new bail be entered; and has the same effect substantially as an injunction. The defendant, therefore, having had notice of the exception to bail, and not having perfected his bail by justification or substitution, was not entitled to judgment of non-pros. for want of a narr. This rule is made absolute.

[Legal Gazette, July 9, 1869, Vol. 1. p. 14.]

Orphans' Court, Philadelphia County.

ESTATE OF THOMAS GIBBONS, dec'd.

1. Items charging board and cash are not for goods sold in the ordinary course of business, and the book containing them, is not such a book of original entry as to be admissible in evidence.
2. Charges for refreshments furnished a sailor, when it does not appear what those refreshments were, and when, from the nature of the business, it is probable that they were liquors, will not be allowed. They are forfeited by the act of March 11th 1834.
3. An offer to prove "a custom among keepers of sailors' boarding houses to advance money to their boarders, and the same became usual items of book account," held, properly rejected.

In the matter of the Estate of Thomas Gibbons, deceased.

Sur exceptions to auditor's report.

Opinion by BREWSTER, J. Delivered July 3d, 1869.

The deceased was entitled to certain prize money earned by him in his service on the Mercedita gun-boat during the rebellion. The accountant received it, and claimed more than one-half for board, refreshments and cash said to have been furnished to a sailor during two weeks' stay in this city. A pocket

diary was offered in evidence, with entries under printed headings. The auditor rejected the charges for board and cash. They were not goods sold in the usual course of business, and the ruling was perfectly proper. If it is doubtful whether the entries made by an attorney for professional services are admissible, *Hall v. Ard*, 12 Wr. 22, it is difficult to see any just ground of complaint upon the rejection of these charges.

The auditor, however, admitted the charge for refreshments, \$9.60. It does not appear what these *refreshments* were. From the plaintiff's occupation it is probable that they were liquors, and if so, the debt is expressly forfeited by the 22d section of the act of March 11th 1834. P. L. 123; Br. Dig. 536.

For this reason, and because the book offered was not "the book in which the claimant kept the accounts of his business," we think all the entries should have been excluded. See *Hall v. Ard*, *supra*. The auditor acted with clear propriety in ruling out the evidence of a so-called "custom among keepers of sailors' boarding houses to advance money to their boarders, and that the same became usual items of book account." Such a custom, if it exist, can be no evidence to charge any man. If there is proof of the loan of money it binds independently of custom; and if the money is not lent, the alleged custom does not touch the case in hand.

So, too, no class of men can make entries in books legal charges when the law says such items are not admissible. It is a custom contrary to the law, and falls within the malediction, *malus usus abolendus est*.

The counsel fee passed by the auditor should, in my opinion, be allowed, because the auditor certifies to its moderation. My brethren, however, entertain a different opinion, and this exception is therefore sustained.

The charge of interest should be sustained, because the accountant did not show that he had kept the funds of the estate apart from his own moneys.

The exceptions filed by Henry D. Gibbons are sustained.

The exceptions filed by the accountant are dismissed.

Orphans' Court, Philadelphia County.

Estate of ANDREW McKENNA, deceased.

Credit for large expenditures for burials, will not be allowed in settling the account of decedent's estates.

**In the matter of the estate of Andrew McKenna, deceased.
Sur exceptions to auditor's report.**

Opinion by BREWSTER, J. Delivered July 8d, 1869.

The accountant claimed credits for funeral and burial expenses amounting to \$175, although no charge was made for the lot. The auditor deducted \$38 from the credits for fencing, and we cannot say that he erred herein. Considering the small amount of the estate, the credits actually allowed seem to be all to which this accountant is entitled. We condemn large expenditures for burials. The assets of an estate should not be squandered in ostentatious displays for the gratification of the weakest of all vanities.

The first exception is therefore dismissed.

The accountant charged herself with the whole amount of the inventory. She claimed that the value of a bed and bedstead should be deducted, because those articles had been improperly included, they being her separate property. Of this she submitted no proof, and the auditor properly refused her demand. He, however, erred in surcharging her, for she was already debited with them in the inventory. •

The second exception is therefore sustained.

Upon the third exception we are of opinion that a surcharge of \$750, with simple interest and without rests, is all that should be allowed.

The fourth and fifth exceptions are overruled.

The sixth is already disposed of in our remarks upon the third exception.

The first, fourth, and fifth exceptions are dismissed.

The second exception is sustained.

The third and sixth exceptions are sustained in part, as above indicated, and the report is recommitted.

[Legal Gazette, July 23, 1869. Vol. 1. p. 29.]

Orphans' Court, Philadelphia County.

Estate of ABRAHAM KULP, deceased.

1. An auditor sur executors' account is not bound to accept the inventory as the basis of his report.
2. Where executors charge themselves with round sums of cash and interest thereon, no such amounts appearing in the inventory, and there is direct evidence of personal estate uninventoried, the burden of proof is on them to show that such sums arose from the sale of property mentioned in the inventory.

In the matter of the estate of Abraham Kulp, deceased.

Sur exceptions to auditor's report.

Opinion by BREWSTER, J. Delivered July 3d, 1869.

The exceptions to the auditor's report in this estate were argued at great length and with great ability. We have since then given them a careful consideration, and are satisfied that the report should be confirmed.

The first four exceptions filed by the accountants complain in substance that the auditor was bound to accept the inventory as the basis of his report, or at all events, if he rejected the inventory, he could not go behind a certain account stated by the executors as between themselves, February 7th, 1861. The argument in support of these propositions was very plausible, and for a time impressed us with its force. Further reflection has, however, convinced us of the propriety of the auditor's conclusions.

The following, amongst other reasons, may be stated in support of this result:

1. The accountants in their paper of February 7th, 1861, charge themselves with round sums of cash and interest thereon. No such amounts are to be found in the inventory. Had they stated that these sums were the proceeds of a part of the goods mentioned in the inventory it would not have been proper to charge them therewith in addition to the inventory. But they produced no such evidence. With them of course was the proof of a sale if one had taken place. Where a party has in his hands the evidence which will prove the identity of two apparently different items of charge, and he fails to produce it, the inference is irresistible that he withholds the proof because it will not support his theory.

2. This is especially proper where there is direct evidence that there was personal estate which was not returned in the inventory.

3. Where there is evidence that a man was carrying on, up to the time of his death, a certain occupation which requires *ex necessitate* the use and ownership of certain implements, his executors should explain the absence of all account of this property. Here was a farmer, working land, making a living therefrom, employing, of course, some stock and agricultural implements. Possession implies ownership. Here again the account-

ants could have explained, and they were silent. The auditor, however, acted upon none of these presumptions; he simply held them to their own admissions. If the cash had come from proceeds of the inventory, the accountants could have shown that fact. The inventory was discredited and the exceptions are unsustained by any principle of law or scrap of evidence.

It is urged in the next place that the auditor erred in not charging Mrs. Pierson with interest upon \$1,100, the consideration of a certain wood lot conveyed to her by the executors. The only parties who claim that she should be thus charged are the accountants. If others objected, it would present a different case. But these executors had no power to sell this lot until after the expiration of a certain life estate. The words of the testator are "*to sell * * after the aforesaid life estate shall cease.*" The executors sold the lot to Mrs. Pierson eighteen years before the expiration of the life estate, under an agreement that she was not to pay interest. If an executor in violation of his duty agrees that no interest shall be charged, he cannot afterwards complain. Others would not be bound, but courts do not release parties from bargains fairly and rationally made.

Lastly, it is urged by one of the executors, that Mrs. Pierson should be charged with interest "on any accumulation of \$500 interest on the mortgage taken by her." Mrs. Pierson is charged by the auditor with the full amount of the mortgage, and with simple interest thereon. She received it not as a trustee but as a devise. A legatee is not chargeable with interest on rents. Such a method of stating an account is invoked against a trustee whose duty it was to invest, but it has no application to a party who receives an asset on account of her distributive share of the estate.

Mrs. Pierson also excepts that she has not been allowed interest on her legacy. The real estate was devised to Sarah Kulp "for and during her natural life," and "all moneys at interest and surplus money not in use to be put to interest and continued so during the natural life of * * Sarah Kulp and her not intermarrying."

Sarah Kulp died in the fall of 1867.

Clearly there was no right in Mrs. Pierson until the death of the life tenant, to demand any proportion of the property, the enjoyment of which was postponed until the death of Mrs. Kulp. The question of trusts was very elaborately discussed at bar, but the authorities cited have no application to a case where there is a direction for accumulation to the end of a life in being. Upon every item of charge against the accountants the auditor has added interest; of the total of these items of principal and interest Mrs. Pierson received her full distributive share, and seeing no error in this behalf in the report of the learned auditor.

The exceptions are all dismissed.

Orphans' Court, Philadelphia County.

PARKER'S ESTATE.

1. A devisee, a trustee and the bulk of the estate being all within the jurisdiction, the Orphans' Court can in the exercise of their discretion, order the executor to pay to the devisee a share of the income, although it was received in another State.
2. Where an executor proves a will and receives his appointment from a Pennsylvania Register, and the domicile of the executor and devisee, and the bulk of the estate are all in Pennsylvania—the debts being all paid—the executor cannot refuse to pay over a share of the income, because it was received from an asset outside of the State.
3. The court will order a trustee who receives in coin, to pay in coin.
4. A trustee may be ordered to pay over his receipts quarterly.

In the matter of the estate of Isaac Brown Parker, deceased.
Before PEIRCE, J., and BREWSTER, J.

This was a petition by a devisee for an order on executors to pay over income.

It was argued October 8th, 1869, by Hon. Wm. Strong, pro petitioner, and by E. Hunn Hanson, Esq., and Daniel Dougherty, Esq., contra.

The opinion of the court was delivered by BREWSTER, J., October 9th, 1869.

Mrs. Marcia R. Freeman, a legatee and devisee under the will of this decedent, has petitioned the court to order the executors of the will to pay to her the income and interest coming to her from the testator's estate in four payments annually. She further asks that income received in coin shall be paid in coin, and that a master be appointed to ascertain what if any income and interest are now in arrear and unpaid.

To this petition an answer has been filed and the respondent has been heard thereon. He assigns the following objections to granting the prayer of the petition:

1. That this court has no "control over any other part of the income than that collected by virtue of the letters testamentary issued by the Register of Wills of Philadelphia county."

2. That payment "in stated quarterly sums would require an accumulation of income by the respondent, and impose a responsibility which he is not obliged by the will to assume."

3. Because the payments have heretofore been made when the larger sums of income were received.

4. As to the prayer for payment in coin—the respondent asserts that as this interest is received from U. S. bonds which are "within the control of the court of Burlington county N. J., the forum of the testator's domicile, he is subject to the jurisdiction of that court concerning the disposition of the bonds and the interest thereon."

The other suggestions of the answer were not pressed.

The 1st and 4th points presented by the respondent raise an objection which has been frequently urged upon our attention in this estate.

We have carefully weighed the able arguments of the counsel in his behalf and have felt the delicacy of deciding upon an objection to our jurisdiction. Notwithstanding all this we have failed to see or feel the force of the objections. The petitioner and the respondent are both domiciled within this jurisdiction—here also is the bulk of the estate. The respondent is the trustee of the petitioner. Out of every dollar received by this executor the petitioner is entitled to her proportion. If we admit the force of this objection we might place a *cestui que trust* in a very embarrassing position. Suppose an asset of this estate had been collected in California or in Japan, would it be seriously contended that a trustee could come into our court and say—it is very true I have collected this money, and every six months I shall be collecting more, but you must go across the continent or to the other side of the world to get your writ? Indeed this would not be the only difficulty. When the process had been issued it must of course be sent here for service, and if the distant State or sovereignty required security for costs from non-residents or would not allow an extra territorial service, there might be a denial of justice.

Where is the law which justifies such a position?

It is supposed to have its foundation in those cases of which *Harvey v. Richards*, 1 Mason, 381, is the type, and in which the doctrine was recognized that the court of the situs might, remit the assets to the forum of the domicile. But Mr. Justice Story, in that case, said that such an order was wholly a question of judicial discretion and so it has always been treated. See *Mothland v. Wireman*, 3 Penna. Rep. 185. Dent's Appeal, 10 Harr. 514. So we regarded this question when the petition for an account was before us and our decree in favor of the devisees was affirmed by the court of last resort.

We see no difficulty or possible injustice in applying the same principle to this petition, and so treating it we think this petitioner should not be sent to New York, to New Jersey, and possibly to a third State, to secure by three or four different orders that which we can give her in one decree.

The respondent shall of course be protected, for in no event will he be ordered to pay a cent beyond what is due to his *cestui que trust*, and thus carefully guarding his rights, he cannot ask for more.

We think therefore that an executor occupying the position of this respondent should, if he desire to do so for his protection from creditors, settle his account in the forum of the domicile, and when this is done he can with safety pay to each *cestui que trust* his share as received.

As it is admitted that there are no creditors of this estate, the respondent here has nothing to do but to divide the income as received amongst the parties in interest. Each distributee is entitled to his share of coin in coin, if he so desire.

The second and third points of the answer present objections to an order for quarterly payments. We see no injustice in this. The executor is not thereby required to advance what is not in hand or to anticipate receipts. He is simply to pay if he is in funds. There is certainly no desire on his part to detain the devisee's income three months after it shall have been received.

The decree submitted by the petitioner is therefore approved.
(See opinions of Supreme Court in Parker's Estate, 3 Legal Gazette, 174.)

[Legal Gazette, October 15, 1869, Vol. 1. p. 123.]

Court of Common Pleas, Philadelphia County.

In re JOSHUA ISAACS.

At the meetings of a commission of lunacy appointed under act of 20th April, 1869, sec. 6, the alleged lunatic should always be present.

In the matter of the Commission of Lunacy against Joshua Isaacs.

Opinion by BREWSTER, J. Delivered October 23d, 1869.

The able report of the commissioner in this case has been submitted to us for approval. It does not appear that any order was made at the time of allowing the commission respecting notice of its execution, as required by the 6th section of the act of June 13th, 1836, (P. L. 594; Br. Dig. 681, § 7.)

It also appears that the alleged lunatic was, during the execution of the commission, in confinement in an insane asylum, Personal service of notice of the time and place of the meeting was made in due form upon the respondent, but of what avail to him was it to give him such a warning and keep him in custody. Of course he could not attend, had no opportunity of confronting his accusers or of cross-examining the witnesses. It is no answer to this to say that he has been found a lunatic. We must guard here against all possible mistakes, and we therefore hold that, whenever it is possible to do so, the defendant should be brought before the jury and have the fullest opportunity of defence.

If it is dangerous to the respondent or to others to adopt this course, the commissioner and jury should go to the asylum, and not only see, but examine the alleged lunatic.

These remarks, of course, have no application to a case where the respondent is at large. But the record ought to show whether he is in confinement or at liberty, and if the former, the inquisition should be *super visum corporis*.

This view is sustained by authority; Bright. Rep. 181; 1 Barb. ch. 38; and is confirmed by our sense of justice.

This report is re-committed.

[Legal Gazette, Nov. 5, 1869, Vol. 1. p. 150.]

Court of Quarter Sessions, Philadelphia County.

In re VERREE ROAD.

In re ROAD IN BYBERRY TOWNSHIP.

Where exceptions are filed to the report of a road jury on the ground that excessive damages have been awarded, the court will only interfere in a clear case; where there is a conflict of testimony the award of the jury will be confirmed.

Sur exceptions to report of road jury.

Opinion by LUDLOW, J.

In both of these cases exceptions have been filed by the city, and in each objections are made to the amount of damages awarded by the jury.

It has been settled, that "when there is no exception alleging misconduct of the jury, and when their report is not palpably erroneous, this court cannot interfere with their finding upon mere allegations of mistake as to facts." See opinion of my brother, President Judge Allison, in matter of Spring Garden street, and also opinion of our late brother Brewster in "new road in Byberry." In Leg. Int. 1867, p. 349.

All that we are called upon to do is to protect the city against excessive damages, and also others who may be affected by our decree.

We have with these principles before us, examined the evidence brought to our notice at the hearing or submitted, and we cannot say that in view of all the testimony the jury in either case has made a mistake.

In the matter of the Verree road, there is undoubtedly a conflict of testimony, and the jury composed of gentlemen of unimpeached character, have decided the question after a personal examination of the road, and with all the witnesses before them.

By one calculation which has been made, the damages exceed the amount awarded, while by another a less sum seems to be sufficient, the jury have adopted the middle course, and unless we are to become road jurors their verdict ought to stand.

In the matter of the Byberry road the same remarks will apply with additional force, and on the whole we think we ought to confirm the reports in both cases.

Reports confirmed.

[Legal Gazette, Dec. 10, 1869, Vol. 1. p. 1C3.]

Court of Quarter Sessions, Philadelphia County.

IN RE OPENING OF CHEW STREET.

1. A prayer in the petition for appointment of a jury of view "to view and adjudge the value of land" taken, &c., is a sufficient prayer for damages.
2. Where in December, 1859, a petition was filed praying the appointment of a jury, and in October, 1860, the report of the jury was set aside, and more than six years afterwards another petition was filed setting out these facts, and a jury was appointed and an award made.

Held, that the second petition connected itself with the first, and the whole becomes one regular proceeding.

Semble. There is no statute of limitations which applies to such proceedings.

Sur exceptions to report of road jury.

Opinion by LUDLOW, J.

Two exceptions were pressed upon our consideration at the argument, and we were asked to set aside this report; first, because the petition and subsequent proceedings were irregular, in that there is no prayer for damages in the petition; and secondly, because the petition was not filed "within six years from the date of the setting aside of the report of the former jury, or within six years from the passage of any ordinance of councils."

In 1859, December 1st, a petition was presented praying for a jury, in February, 1860, a jury was drawn, and on the 21st June, 1860, the jury filed a report. On September 29th, 1860, exceptions were filed, and on October 2d, 1860, the court set aside the report; more than six years afterwards the present petitioners, reciting the foregoing facts, presented this petition, a jury has been appointed upon this petition, and their report is now before us.

Under the act of April 21st, 1855, councils ordered this street to be opened, under the same act "any owner whose ground may be taken" may petition this court "for viewers to assess the damages," these petitioners did come into court, and ask for a jury "to view and adjudge the value of land" taken by Chew street, averring that the street would pass through their land. What is this but a prayer for damages, if in the opinion of the jury any damages have been sustained?

This is not a case like that of the opening of Diamond street, for there an effort was made, not by the *owners* of land, but by the city, to open a multitude of streets, and thus make the city a petitioner against herself.

We cannot conceive how any petition can stand if in all cases an owner must aver that he will sustain damage; it is enough, if, being an owner of land through which a street will pass, he petitions us to appoint a jury to view and adjudge the value of land taken, for inferentially he claims damages if he has sustained any.

Upon the second point presented we have only to say, that we know of no statute of limitations, which applies to this case; true, under the act of 1855, upon three months' notice, councils may proceed to open a street on giving security for damages, but we can find no law which limits the time during which an owner may apply for viewers, he may do so "forth-with" but he *must* not so do.

In this case, the last petition fairly connects itself with the first, and thus the whole proceeding becomes a regular one.

The remaining exceptions were not pressed at the hearing, and we must dismiss the exceptions and confirm the report.

[Legal Gazette, Dec. 10, 1869, Vol. 1. p. 188.]

Court of Common Pleas, Philadelphia County.

LEARY v. HARTER.

1. An action brought to recover damages for an obstruction to the plaintiff's right of way is not a case on a real *contract* within the meaning of the act of March 20th, 1810, and is within the jurisdiction of an alderman.
2. But where the injury complained of is the planting of posts in a private alley by the defendant, "whereby plaintiff's horses and carts were greatly damaged," the proper remedy is an action on the case and not trespass.
3. The damages in such case being consequential the alderman had no jurisdiction.

Certiorari to alderman.

Opinion by ALLISON, P. J. Delivered December 18th, 1869.

There are six suits between the same plaintiff, the defendants being different in each suit, all depending upon the same questions which are brought up on certiorari.

The first objection relied on raises the question of jurisdiction in the alderman, and is based on the decision in *Goddard v. McKean*, 6 W. 337. The principle which ruled that case has no application to the several causes of action upon which the alderman adjudicated, in the suits at the instance of Leary, against Harter and others.

In *Goddard v. McKean* the plaintiff brought suit before a justice of the peace on a note which was given for the privilege of taking water out of a dam and conducting the same by a mill race across the land claimed by the plaintiff; and because the act of 1810 expressly excepts from the jurisdiction of justices all cases of *real contract*, where the title to land may come in question, the action was held to have been properly dismissed, for want of jurisdiction in the justice. See also 8 Harris, 468; 3 Harris, 360; 3 Penna. R. 388; 2 W. 135; 6 W. 337. The cases before us are in no way connected with any *contract* concerning realty, but are founded on an alleged tort, which is set out in the transcript, charges the defendant with planting posts

in a private alley, whereby plaintiff's horses and carts were greatly damaged. This exception is not well founded.

The only other point upon which the exceptions relied was that the action was not properly brought, the plaintiff having sued in trespass, instead of bringing an action on the case. Case is the proper remedy for injury not committed with force, or having been committed with force, where the injury is not immediate but is consequential. The torts which this form of action is used to redress are either by nonfeasance, by misfeasance, or by malfeasance. It lies for disturbance in the enjoyment of a right of way or private road or alley, of which a plaintiff may be possessed. The cause of complaint in this case is one of malfeasance, a wrongful obstruction of a private alley, held in common by plaintiff and other owners of neighboring property. The action is not brought for an injury to the property or the person of the plaintiff, which was done at the time at which the posts were planted, and which was the immediate and direct consequences of the act itself. On the contrary, the assertion is, that having planted the obstruction, an injury *thereby* was caused, or resulted to the personal property of the plaintiff, and because by his own showing, the damage which was inflicted, was not direct and immediate, but was a consequence of the wrongful act of the defendant, that it flowed from it or was occasioned by it, trespass cannot be maintained. The familiar illustration which is given by Le Blanc, Justice, 8 East. 306, to point out the distinction between trespass and case, is with but an immaterial difference, the case before us. If a log be thrown into the highway, and at the time of its being thrown, it hit any person, it is trespass; but if after it be thrown, any person by going along the road receive an injury by falling over it, as it lies there, it is case. Here the logs or posts were not thrown but planted in a passage way, and the injury which resulted therefrom, was, at a subsequent time, when the property of plaintiff was passing along or over the obstructed way, and resulted from the obstruction.

The planting of the posts did not injure the plaintiff, but having been planted, he was damaged in his property, by contact therewith, or in some other way not specified. Whatever the injury was, it was purely consequential, and was therefore not within the jurisdiction of the alderman.

The exception to the jurisdiction is sustained and the judgment of the alderman is reversed.

Court of Quarter Session, Philadelphia County.

In re CONNECTING RAILROAD.

1. An answer to a petition by a property owner for the appointment of a jury of view, to assess the damages done him by construction of a railroad, denying the title of the petitioner, will not be allowed to be filed *nunc pro tunc* after report of jury filed.

Quære, whether an answer as such can be filed at any time in such a proceeding.

2. Under their power to inquire into the amount of the damages, and to set aside the report of the jury where they are excessive, this court can inquire into the *quantum* of the petitioner's estate; if the evidence shows that he has no estate, which is the subject of damages, any awards would necessarily be excessive.
3. Where the evidence showed that the road for the taking of which the petitioner asks an award, was within the lines of a highway, that the railroad company was incorporated and located its road over the said highway in 1863, and afterwards in 1865 (and before the actual building of the road), an act was passed vacating said highway, the petitioner has not such a title as would justify any award of damages.
4. The right of the railroad company was vested by the survey and location under its charter, and no subsequent action of the Legislature could subject it to the payment of damages not due before.

Sur motion to file an answer *nunc pro tunc* and exceptions to report of jury of view.

Opinion by LUDLOW, J. Delivered December 18th, 1869.

Two motions have been made in this case, we will dispose of both in this opinion.

John Turner petitioned the court at October Term, 1869, for a jury to assess the damages which he declared he had sustained by reason of the construction of this railroad through his land. The jury proceeded in the ordinary method to discharge the duty imposed upon them, and after they had made a report the counsel for the railroad company came into court and asked to file an answer *nunc pro tunc* denying the title of the petitioner to the land in question.

This practice we cannot sanction and for the reason, that in *Church v. Northern Central Railroad*, 9 Wr. 339, it was decided, "that if the party against whom the application is made does not at the time of the application for the appointment of viewers, object to the *quantum* of interest or title set forth, he is too late, and the only remedy is by appeal, unless some special statute directs another course to be pursued, or the facts appear by the record or evidence legally before the court. To permit an answer to be filed *nunc pro tunc*, and after the jury have completed their labors, would be merely by an ingenious method to get rid of an adverse report contrary to law; it may be doubted whether in any case, at any time, an answer as such ought to be filed; it has never been the practice, and in the single instance in which in a road case an answer appears upon our records, it is to be remarked, that no objection was made to the answer, and the matter passed unnoticed by the court.

The motion therefore in this cause to file an answer *nunc pro tunc* is overruled.

The second motion to set aside this report upon exceptions

filed to it, brings up for consideration a number of questions, and among others the one which declares the damages found to be excessive.

It cannot be questioned that it is our right and duty to examine all the evidence produced before the jury, and if for any reason we discover that the damages ought not to have been awarded, then they must necessarily be excessive. We do not look at that which can in any sense be said to be *dehors* the record, but at that upon which the verdict has been founded, and if the evidence discloses as a matter of fact or law, that the land in truth does not belong to the petitioner, our sense of justice and right will not permit us to confirm the report awarding damages.

The Connecting Railroad was incorporated in April, 1863, it has power to lay out, construct and operate a single or double track railway. By the evidence it appears that in June, 1863, the president of the road appointed an engineer "to make a survey and locate the line of the most practicable route as contemplated by the charter;" this was accordingly done, and on the 24th day of November, 1863, as appears by the minutes of the company, the board of directors approved the plans submitted, and a resolution was adopted directing the construction of the road, "to be commenced and prosecuted vigorously."

By the survey and location thus made and approved, the road passed over and along the middle of what was then Ellwood lane.

In March, 1865, this lane was vacated, and the petitioner claiming to own a part of the land bounded by the lane, now claims damages for that portion of it, which as he insists reverted to him as soon as the said lane was vacated.

We will not now stop to inquire who was the real owner of any portion of the ground bounding the land in dispute, nor will we deny a principle perfectly well settled, to wit: that where a public street is called for as a boundary the fee passes to the centre of the street; *Paul v. Carver*, 2 C. 223; *Cox v. Freedly*, 9 C. 124; assuming both of these propositions to be true, for our present purpose and regarding this petitioner as the owner of the adjoining land, has he any right to damages, or has he by this testimony such a title to the land as will justify a jury in giving to him any damages whatever.

In Pennsylvania real estate is held subject to the right of *eminent domain*, and the Legislature have perfect power to authorize the construction of a road on a public highway; *Bailey v. Miltenberger*, 7 C. 37; *Trenton Railroad Company* 6 Wh. 25; *Mercer v. Pittsburg & Fort Wayne Railroad*, 12 C. 99; *Commonwealth v. Erie and North East Railroad Company*, 3 C. 354.

There is nothing either in the constitution of the commonwealth or in the statute book, which prohibits the Legislature from mounting so to speak, an easement upon an easement. It is therefore perfectly clear that had not Ellwood lane been

vacated this petitioner could not have had a shadow of claim for damages, because he had no such immediate interest in the land covered by the lane, as would warrant a court or jury in assessing damages in his favor.

What was the legal effect of March, 1865, vacating Ellwood lane, upon the rights of the petitioner? In answering this question we dispose of this case. Had the act of incorporation of this company passed *after* the law vacating the lane, the question would at once be solved in favor of the petitioner, and this would undoubtedly have been the case had the company been guilty of *laches* or slept upon their rights.

What, however, are the facts?

Early in 1863, acting under and by virtue of a power granted by the commonwealth, this company proceeded by their agents to make an actual survey and location of their road, in November of the same year this survey and location are adopted by the company.

Here then we have a grant by the sovereign power coupled with an acceptance of it, and an exercise of a legally conferred power by actual survey and location.

After all these rights had attached, the act vacating the lane was passed.

In *Neal v. The Pittsburg & Connelsville Railroad Company*, 7 Casey, 19, a principle was adopted which rules this case—in that instance a road had been simply located, and although the company had not taken possession of the land, and desired to change their route, the court held they were responsible for damages. Speaking of the proceeding to recover damages, the court say, "The law allows this proceeding after the road is located, and after a proper effort to agree upon compensation has been made." And again, "The company has made its choice and must stand on it." How in this instance was a choice made?

Evidently in the opinion of the court by locating the road, and that act alone made the company responsible for the land damages.

By analogy, the right gained by survey, examination and location was again enforced in *Warren & Franklin Railroad Company v. Clarion Land Company*, 4 P. F. Smith, 87, although the contest there was between two companies each claiming the right to the same route.

Vested as the Connecting Railroad Company has been with ample powers derived from their legislative grant, having accepted this grant and acting upon it by actual survey and location, we are obliged to hold that no subsequent legislative enactment could strip the company of their rights and make them responsible for these damages.

We must therefore sustain the exception to the damages, and set aside the report of the jury.

Court of Common Pleas, Philadelphia County.

IN EQUITY.

BAST v. ANSPACH.

1. The law as to the competency as witnesses of husband and wife for or against each other, has not been altered by the act of 1869. It stands as it had been declared and practised before the passage of that act.
2. Where a bill had been filed against the husband and wife, and on the examination it was proposed to ask the husband whether certain shares of stock standing in his wife's name belonged to her, and where she obtained the means, and how much she paid for them. *Held*, that the husband could not be compelled to answer; his answer would not be evidence.
3. The fact that he had under objection answered some questions of similar import, would not bring him within the rule that a witness who has testified in part, must answer fully as to the whole. Because,
First, objection having been made and persisted in during the examination, there was no waiver of his right to refuse to answer. Secondly, the privilege of the wife or husband does not depend on the choice of the witness; it is the right of the other party, and from motives of public policy the disability is made absolute by the law.

Sur rule to show cause why attachment should not issue against J. A. for refusing to answer.

Opinion by ALLISON, P. J. Delivered December 31st, 1869.

This is a proceeding in equity, and is before an examiner to take the testimony.

John Anspach, Jr., a defendant, was called by plaintiff as a witness, and interrogated in relation to 7,000 shares of stock which stand on the Stock Ledger and Stock Certificate book of the Bingham Mining and Lumbering Company in the name of L. A. Anspach, wife of the witness, and made a co-defendant with him in the suit.

To the first material question—Do these shares belong to her? (Mrs. Anspach), objection was made by the counsel for the defendants. To the examination which followed, objection continued to be repeated; and to the question—From what source did your wife derive the means to pay for the interest with which she was credited, and how much did she pay for it? the witness, under instruction of counsel, refused to make answer.

The act of April 15th, 1869, P. L., contains the following proviso: This act shall not alter the law as now declared and practiced in the courts of this commonwealth, so as to allow the husband and wife to testify against each other.

The husband and wife are by this act not only protected against any effort which may be made to compel them to testify against each other, but they are not *allowed* to testify one against the other.

The law, as it stood before the passage of that act, remains unaltered, and as it had been declared and practiced theretofore, so it remains now. How had the law been declared, and how practiced?

First. A husband and wife were not allowed to testify in a cause, civil or criminal, in which the other was a party.

Second. A wife is not competent to testify against any co-defendant joined with her husband, if the testimony concern her husband; nor as to that for which, if true, her husband may be indicted, and *vice versa*. It will not be allowed even by consent.

Third. This principle is applied where the husband and wife are not parties to the suit, but have an interest directly involved in the result. So, also, a husband cannot be a witness for or against his wife, in a question touching her separate estate. See notes to sec. 341, of 1 Greenleaf on Evidence, in which authorities English and American are mentioned.

Where one party, though a competent witness, is not bound to answer a particular question, because the answer would expose him to a criminal prosecution, the other is not bound to answer the same question. 1 Greenleaf, sections 334, 335, 340, 341. There are exceptions to these rules, but it is not claimed that this case falls within either of those which are recognized in the books.

This exclusion is founded partly on the identity of the legal rights and interests of husband and wife, and partly on principles of public policy.

The authorities say, that the great object of the rule is to secure domestic happiness, by placing the protecting seal of the law upon all confidential communications, between husband and wife, which are protected even after the death of one of the parties, or after they are divorced.

Mrs. Anspach having been made a party defendant in the suit with her husband, these principles apply with all their force. The husband's lips are sealed; he shall not be allowed, even with her consent, to answer touching the matters upon which he was sought to be interrogated. To permit him to answer would be to make him a witness for or against his wife, neither of which is approved by the law, as it has been declared and practiced. And if there has been any concealment of property, with intent to keep creditors at bay, the answer would expose one or both the parties to a criminal prosecution.

It is urged by the plaintiff that the witness should be compelled to answer, on the principle that having testified in part his testimony cannot afterwards be stricken out, and he will be compelled to go on and to answer fully. For this proposition, *Rees v. Livingston*, 5 Wright, 113; *Patterson v. Wallace*, 8 Wright, 88, and Sharswood's *Starkie on Evid.* 114, are cited.

The answer to this is two-fold. First. The objection to the examination of John Anspach as a witness was taken at the outset, and persisted in at each step as the examination progressed. There was no waiver of objection to competency to testify, and by such waiver taking advantage of what the witness had said, up to a definite point of his testimony. Upon such a state of facts the decisions in 5th and 8th Wright were

made, and they were not cases involving the relation of husband and wife.

Second. If no objection had been made, the witness could not be attached for refusing to answer, because it is the wife's privilege to close his mouth at any stage of the examination, upon the same principle that an attorney's lips are sealed as to the confidential communications of the client. It is the privilege of the wife, or husband, or of the client, and not the choice of the witness which determines a question of this kind; but in a case like that which is here presented, the law steps in and enjoins silence, on the grounds of public interest, which cannot be altered, though consent be given. The testimony of the witness, as far as it has been taken under objection, ought to be stricken out by the examiner, none of it having any proper standing in the cause.

Rule for attachment discharged.

[Legal Gazette, January 7, 1870, Vol. 2, p. 6.]

Court of Quarter Sessions, Philadelphia County.

TURNER v. CONNECTING RAILWAY COMPANY.

1. The amendment to the charter of the Connecting Railway Company, approved May 4th, 1864, takes away from the company and the claimant the right of appeal from the award of a jury of view to assess damages for land or materials taken in the construction of that road.
2. The remedy, where wrong has been done, is by *exception*.

Sur motion to strike off appeal.

Opinion by ALLISON, P. J. Delivered December 31st, 1869.

The Connecting Railway Company, by the fourth section of the act of the 14th of April, 1863, is made subject to all the provisions and restrictions, and entitled to all the privileges of the general laws of Pennsylvania affecting railroad corporations. P. L. 1843, 457.

The third section of the act of April 9th, 1858, gives to either party an appeal from the report of a jury appointed to assess damages, for land or materials, taken for the construction of a railroad; which appeal may be tried by a jury. The appellant may also file exceptions with the appeal: If they are allowed, a new view must be ordered, but if disallowed the trial proceeds.

The supplement to the act incorporating the Connecting Railway Company, passed the 7th of May, 1864, P. L. 896, repeals so much of the 4th section of the act of 1863, as subjects the said company to all the provisions and restrictions, and entitles them to all the privileges of the general railroad law, affecting railroad corporations, in reference to securing, assessing, and paying damages, resulting from the location of said railroad.

A subsequent portion of this section gives to the company,

and the claimant for damages, a right to file exceptions, either to the regularity of the proceedings, or to the assessment of damages.

The right of the railroad company to appeal from the assessment of damages, and to have a trial by jury, on said appeal, is clearly taken away by the act of 1864.

The appeal and trial by jury which is given to either party, by the act of 1850, is out of the course of proceedings, which from time immemorial had been followed in regard to the assessment of damages for land taken for highways in Pennsylvania. The questions of value have been decided by the court, on exceptions filed to the report of the jury appointed to assess such damages, and when by the act of 1864, the privileges and restrictions of the act of 1850, in regard to the assessment and payment of damages, were taken away from both the company and the owner of the land or material, this right of appeal, with its incidents, could no longer be claimed. The parties are turned over to their exceptions, to be decided by the court without a jury trial, as is done in all cases of damages, under the general road law.

The appeal of the company is stricken off.

[Legal Gazette, January 7, 1870, Vol. 2, p. 7.]

Register's Court, Philadelphia County.

ESTATE OF VIRGINIA JOHNSON.

Claim of commonwealth for collateral inheritance tax on a ground rent of \$600, devised in trust for Virginia Johnson, under will of Robert S. Johnson, deceased.

In the Register's Court for the County of Philadelphia, December 9th, 1869.

In the matter of the Trust Estate for Virginia Johnson, under the will of Robert S. Johnson, deceased.

The following case is submitted for the opinion of the Court:

Robert S. Johnson, by his last will and testament, duly proved May 4th, 1866, and registered at Philadelphia, did, *inter alia*, devise and bequeath as follows:

"I give, devise and bequeath to William M. Whitaker, Robert M. Mitcheson, and William J. Kenderdine, nevertheless in trust for the benefit of my granddaughter, Virginia Johnson, a ground rent of six hundred dollars per annum, payable half yearly, by Robbins & Verree; five thousand dollars of the Lehigh Coal and Navigation Company loan, the rent and interest to be collected as coming due, and the amount, deducting the tax and expenses, to be paid over to her sister, Susan F. Kerlin, to be expended for her schooling, and support of said Virginia."

The testator further provided by his said will, as follows, viz.:

"I direct the several sums bequeathed to the trustees for the

benefit of my heirs, to be paid over to the devisees as follows: To Susan F. Kerlin, in five years after my death, provided the said trustees shall judge it best for the interest of said Susan F. Kerlin, and at her request to do so, if her husband, Charles Kerlin, should die before that time, then immediately after such event. If Susan F. Kerlin should die before her husband, then the amount bequeathed to her by this will to be divided among her sisters and brother then living, or the heirs of them dead, share and share alike. The bequest to my granddaughter, Mary Johnson, to be paid over to her when she attains the age of thirty years. *The bequest to my (grand) daughter, Virginia, to be paid to her on her attaining the age of twenty-five years; if either should die before they, or either of them, attain said age, and no children surviving, these bequests or [to] either of the said granddaughters, to be divided among her sisters and brother surviving.*"

Virginia Johnson, the *cestui que trust*, afterwards died in October, 1868, without attaining the prescribed age of twenty-five years (being at the time an infant under the age of twenty-one years), and unmarried, and without issue, leaving to survive her three sisters and one brother (all named in the will of their grandfather), viz., Susan F. Kerlin, Sarah A. Malony, Mary G. Neall, and Charles Seldon Johnson.

The personal estate of the trust has already been distributed by an auditor appointed by the Orphans' Court, as governed by the will of Robert S. Johnson, deceased, and the distribution thereof confirmed.

This case is stated in order to settle the question of the liability of the yearly ground rent of \$600, to pay a collateral inheritance tax to the State of Pennsylvania.

If the court shall be of opinion that the sisters and brother of Virginia Johnson take the yearly ground rent by virtue of the limitation to them in the will of their grandfather, then it is agreed that no collateral inheritance tax can be demanded.

If the court shall be of opinion that the sisters and brother of Virginia Johnson take the yearly ground rent by virtue of the intestate laws of Pennsylvania, and not under the will of their grandfather, then a decree is to be entered for four hundred and forty-one dollars (\$441), in favor of the Register of Wills for said County of Philadelphia.

ARGUMENT.

No elaborate argument is needed to show that the ground rent of six hundred dollars goes to the brother and sister of Virginia Johnson, by virtue of the limitation in their grandfather's will. The principle which sustains such a devise over, has more than once been recognized and applied in Pennsylvania.

In *Mifflin v. Neall*, 6 S. & R. 461, in the case of a bequest of testatrix's residuary personal estate to her two sons, "and in case either of them died without will or lawful issue, then the property of such descending from and given in the lifetime by the testatrix was to descend to the survivor, his heirs and assigns forever." Chief Justice Tilghman held that this was a good executory bequest, and that upon the death of one, intestate and without issue, the survivor took the whole.

In *Coates Street*, 2 Ashm 12, where one devised and bequeathed the residue of his estate, real and personal, to his seven children by name, their heirs, executors, administrators and assigns forever, to be equally divided between them, share and share alike, adding the proviso, 'provided, that if either of my said children shall happen to die *intestate, unmarried, and without issue*, and without having disposed of his or her share in my estate, my mind and will is, that the part or share of him so dying, shall go to and be equally divided between my surviving children, part and share alike.' Judge King, in an elaborate and learned opinion said, "There is no doubt but that the limitation over to the surviving children of Thomas Cuthbert, the elder, in the general proviso contained in his will, is good by way of executory devise of the realty, and of executory bequest of the personalty.

In *Kelso v. Dickey*, 7 W & S. 279, the words of the will were as follows: "And in case she lives unmarried to the age of *twenty-five years*, then the whole amount, principle and interest, to be paid to her, or the whole amount to be paid on the birth of issue. But in case she dies *before the age of twenty-five years*, or *without issue born*, then to be divided equally between my sister H. and brothers W. and G." The daughter married, and died without issue, before attaining the age of twenty-five years. *Held*, that the limitation over was not too remote, but took effect.

See also *Commonwealth v. Williams' Executors*. 1 Harris, 29.

The present case is a stronger one than either of the cases cited, and it closely resembles the last. There was no power of appointment, as in the first two cases, and the word children is used instead of issue, as in the last. No case can be remembered where the word children is used, in which the limitation over has been held too remote. The word "children," rebuts any theory of an *indefinite failure of issue*.

On the whole case, therefore, and the current of authorities, it is submitted that there can be no possible doubt that the limitation over to the sisters and brother of Virginia Johnson is good, and that, therefore, this real estate is not subject to the payment of a collateral inheritance tax to the State of Pennsylvania.

DECREE.

And now, December 9th, 1869, it is ordered and decreed that the claim of the State of Pennsylvania for collateral inheritance tax upon the ground rent of \$600 per annum, devised in trust for Virginia Johnson, under the will of Robert S. Johnson, deceased, be disallowed, and that the estate pass to the persons limited in the will of said Robert S. Johnson, freed and discharged from any such claim.

[Legal Gazette, Jan. 21, 1870, Vol. 2, p. 20.]

Orphans' Court, Philadelphia County.

In re BINGHAM'S ESTATE.

A testator domiciled in Pennsylvania bequeathed one-fifth of the residue of his personal estate to trustees, in trust, to pay over the whole net income to his son Alexander during the term of his natural life; and at his death his children, and the issue of deceased children living at the time of his death, became entitled to the estate. In case, however, the said Alexander died unmarried, in that event, "and in no other," he might bequeath his share by a will executed in the presence of two witnesses to whom he might think proper, "and the trustee * * shall pay over the same to such legatee or legatees."

The said Alexander died, domiciled in England, leaving a will which, although by the law of England, statute 1 Vic. c 26, §37, was a valid execution of the power, by the law of Pennsylvania was not such an execution of it, because it neither contained any reference to the power, or to the property as to which it was given, and it could have an operation without passing the estate given him by his father's will.

Held. 1. That the deed or will creating the power, and the deed or will executing it, make together but one instrument, the deed or will of execution is but a declaration of uses upon which the property subject to the power shall be held, and the estate vests by force of the instrument creating it.

2. That the law of the domicile of the donor of the power shall prevail in construing the will of the donee, and this is the law of England as well as of Pennsylvania.

3. The fees of the counsel for the accountants only should be allowed out of the fund.

Sur exceptions to auditors' report.

Opinion by LUDLOW, J.

William Bingham, domiciled in the State of Pennsylvania, by his will gave one-fifth of the residue of his personal estate to trustees, in trust, to pay over the whole net income to his son Alexander for and during the term of his natural life, and immediately after his death his children, and the issue of deceased children living at the time of his death, became entitled to an equal division of his estate. The testator, by the fourteenth clause of his will, created a power of appointment in the event of the death of this son (and other children) unmarried. In that event, "and in no other," he might bequeath his share, thus held in trust, by a will executed in the presence of two witnesses, to such person or persons as the son might think proper, "and the trustee or trustees for the time being * * shall pay over the same to such legatee or legatees."

Should the son die unmarried and intestate, or if married, or having been married, should he die without lawful issue, living at the time of his death, then the testator directed the property to be divided among the children and issue of deceased children.

The auditors report that Alexander died, having been at the time of his death domiciled in England; he left a will "which does not in terms pretend to execute the power contained in his father's will, nor is it mentioned or referred or alluded to. On its face it is a will made by a testator to dispose of his own absolute property."

The donor of the power being domiciled in Pennsylvania dies; the donee also dies, having executed a will, being domiciled in England. Upon this state of the facts two questions arise.

1st. Did the will of Alexander, the son, operate under the laws of Pennsylvania as an execution of the power contained in the will of William Bingham, his father?

2d. If Alexander's will is not a valid execution of the power by the law of this State, and is valid by the law of England, the place of his domicile, shall the law of Pennsylvania or of England prevail, or in other words, shall the law of the domicile of the donor of the power, or of the donee, pass the estate?

The first question can, we think, be easily answered: it is settled law with us, there must either be some reference to the power in the instrument of execution, or to the property upon which it is to operate, or the will, executing the power, must have no operation except as an execution of it. *Wetherill v. Wetherill*, 6 H. 271; and authorities cited in the argument. There is no pretence that this will refers to the power, and as the testator Alexander died possessed of property absolutely his own, his will of course may and does operate upon his individual estate.

Has he referred to any *property* upon which, by any latitude of construction, we can hold that his will was intended to take effect as an execution of his power of appointment?

It has been argued, that an intention to execute the power may be inferred because of the nature of certain investments, the creation of a "trust legacy," which could not in whole be satisfied out of his individual estate, and also because in his will he uses the following language: "Part of my personal estate *may be invested* at the time of my decease in other securities in the United States of America."

We have searched in vain for any evidence supporting the first reason, the second would require us to give a most forced and unnatural interpretation to the will, and to go further than any court has ever yet gone, by introducing the principle that a testator by disposing of more property than he owns, thereby

intends inferentially to execute a power, and the third reason, we think, fails, for the testator not only speaks of "my personal estate," thereby excluding the idea that he intended to dispose of any other property, but refers simply to the fact that by some possibility his investments might in the future be made in United States securities.

The rule of construction which declares, "that the intention to execute the power must be so clearly manifested in the act of execution that it is impossible to impute any other," binds us in this case and disposes of the first proposition.

Does this estate pass by virtue of the law of the domicile of the donor or donee of the power?

This question, because of statute of 1 Vic. c. 26, § 27, becomes to the parties before us of great practical importance, and has been very learnedly discussed.

By this statute "a bequest of the personal estate of the testator, or any bequest of personal property, described in a general manner, shall be construed to include any personal estate, (or any personal estate to which such description shall extend as the case may be) which he may have power to appoint in any manner he may think proper, *and shall operate as an execution of such power unless a contrary intention shall appear.*"

It may very well be doubted whether even under this statute this power has been executed, because the law includes personal property over which there is a general, and not a restricted power of appointment, a bequest operates upon an estate, "which he may have power to appoint in any manner he may think proper."

In this case the power is restricted to legatees, and although Mr. Alexander Bingham in his will charged the residue of his estate with the payment of his debts, we can not see that this circumstance can affect the construction of his will as an execution of his power.

Waiving, however, the view above stated, we think we can rely upon other principles in deciding this case.

A power is but an authority enabling a person to dispose, in certain methods, of an interest vested in himself or some other person.

The appointer acts, but only by virtue of paramount authority, the deed or will creating the power, together with the deed or will executing it, make in effect but one instrument, but the estate either real or personal vests by virtue of the instrument creating the power. Sugden on Powers, Vol. 1, ch. 3, § 52; IV. Kent. Com. *388; *Bradish v. Gibbs*, 3 Johns, ch. 550; *Doolittle v. Lewis*, 7 Ibid. 48; *Com. v. Duffield*, 2 Jones, 279-281.

We do not intend to deny the familiar principle, that the in-

terpretation and construction of wills must be governed by the law of the domicile.

Here then is a clear conflict between the law of the domicile of the donor of the power, and that of the donee: the true question is, under which will do the parties take, and for the reasons and upon the authority cited, we simply hold that the title vests by virtue of the paramount authority.

There is, however, another view of this subject which is fatal to the exceptants.

By the law of England, so far as we have been able to ascertain it, the principle that a will must be executed according to the law of the domicile at the time of death, does not apply to a will, so far as it is made in execution of powers. This was directly decided in *Tatnall v. Hankey*, 2 Moore, P. C. 342. Sir. C. Creswell, in 6 J. N. S. 345, *In re Alexander*, found he had mistaken Lord Ch. Brougham's decision in *Tatnall v. Hankey*, when he decided *Crookenden v. Fuller*, 5 J. N. S. 1225, as he did, and he corrects the mistake, and thus gives force and vigor to the first decision. *In re Alexander* was decided as late as April, 1860.

The Lord Chancellor, in *Tatnall v. Hankey*, bases his opinion upon the peculiar, "constitution of powers and their nature," or as the learned auditors in this case properly and forcibly expressed the principle which rules the case, when they said, speaking of a testamentary execution of a power "such an instrument is not properly a will, it is nothing but a declaration of uses upon which the property subject to the power shall be held: and the appointee takes by force of the act of the donor and not of the donee of the power."

We are clearly of the opinion that the law of the domicile of the donor of the power must prevail.

The auditors disagreed upon the question whether the counsel for the parties, sustaining or opposing the will of Mr. Alexander Bingham, ought to be paid for their services out of the funds of the estate; we are of the opinion that these counsel fees ought to be paid by the parties represented, and not out of the funds in the hands of the accountant.

The auditors very properly allowed the credit for the fees of the counsel for the accountant, and this because an executor or administrator is entitled to professional advice and assistance for the interests of all parties concerned.

The law upon this point being settled, we know of no practice here which goes beyond it, and we have no inclination to carry it further.

The English equity practice has therefore no application, and while we do not of course refer to the case now before us, we ought to add that the policy of the law condemns a practice,

which would inevitably increase experiment, and therefore endless and vexatious litigation.

Exceptions dismissed and report confirmed.

Hon. *Wm. Strong* for exceptions, *R. C. McMurtrie, Esq.*, against. (Affirmed by Supreme Court, in *Bingham's Appeal*, 14 P. F. Smith, 345.)

[Legal Gazette, January 29, 1870, Vol. 2, p. 26.]

Supreme Court of Pennsylvania.

AT NISI PRIUS. IN EQUITY.

SNYDER v. SMITH et al., Committee, &c.

1. The councils of the city of Philadelphia have exclusive and final jurisdiction to try contested elections of their own members, and every presumption is in favor of their proceedings.
2. The rule of computation of time, "that whenever by a rule of court or an act of Assembly a given number of days are allowed to do an act, or it is said an act may be done within a given number of days, the day in which the rule is taken or the decision made is excluded," stated in *Gomiter's Est.*, 3 Penna. 200, affirmed.

Sur motion for preliminary injunction.

Opinion by AGNEW, J. Delivered January 31st, 1870.

Under the thirty-fifth section of the act of February 2d, 1854, the city council have exclusive and final jurisdiction to try contested elections of their own members. Their judgments are subject to no appeal. It is clear that, as in other tribunals to which an exclusive jurisdiction is committed, they must determine the question of jurisdiction for themselves. Every presumption therefore is in favor of their rightful jurisdiction when they have once assumed it. It would be destructive to the public interest and of all correct principles of action, were it to be held that a court of equity could arrest *in limine* the proceedings of a *quasi* political body having power to determine its own jurisdiction, for every seeming departure in the exercise of its powers.

Admitting the power of the court to intervene to prevent a flagrant usurpation of undelegated authority, the case should be clear and palpable. It is not denied that the subject matter is within the powers of the select council, or that the committee has been duly constituted. What then is the ground of this bill to restrain the committee? Simply that in the exercise of its undeniable right of judgment, the council has decided that the petition to contest the seat of the sitting member was presented within ten days. The councils were organized on the 3d of January, and the petition was presented and received on the 13th, clearly within ten days, unless we include the day of the organization in the count.

The case hinges on the old dispute, whether the time is to be counted from the *act* or from the *day* of the act—a

controversy which, in England, Lord Mansfield himself could not settle upon a conflict of decision for two hundred years preceding his time, and which, in this State, has been a judicial game of battledore and shuttlecock down to the case of *Cromelien v. Brink*, 5 Casey, 522. In that case Judge Porter at last settled the rule of computation to be that stated in *Gomiter's Estate*, 3 Pennsylvania, 203: "That whenever, by a rule of court or an act of Assembly, a given number of days are allowed to do an act, or it is said an act may be done within a given number of days, the day in which the rule is taken or the decision made is excluded." This accords with the true principle, that where a right is to be saved, or a remedy is given, the Legislature is not to be presumed to curtail its own gift of power for a beneficial purpose, in the absence of a clear and well-defined intent. The provision here is that the complaint of an undue election shall not be acted on by the council "unless presented within ten days after the organization of councils." Organization, the act from which the computation is made, may not be complete until the last hour of the day. That day is imperfect, and may be curtailed by disputes in the organization until but a point of time remains. In fairness to the right to be preserved and the remedy to be enforced, that day should not be counted. The contest is the only means given to contest an alleged wrong. It is a case where a right is to be preserved and a remedy enforced. It is the right of the people that their true representative shall have his seat, and the contest is their only remedy to unseat one who has by fraud or false return usurped the place of him chosen by them to fill it. What is the contest but an appeal of the people from the decision of the officers of the election to the council, to determine their right of representation? Therefore, as in appeals from justices, arbitrators, and appeals from inferior courts, the day of the act—to wit, the decision, the filing of the award, or the judgment—the day of the act must be excluded, and the count of time begins upon the next day. The rule laid down in *Gomiter's Estate* and *Cromelien v. Brink*, has been reaffirmed in *Marks' Estate v. Russell*, 4 Wright, 372, and is emphatic, because it reversed the judgment in the lower court founded on the opposite interpretation.

But were the rule less clear I would refuse this special injunction, and leave the party to the final result of his bill. Nothing is more to be reprobated than an interference with the lawful powers of a body such as the councils of a city like Philadelphia, representing a constituency of almost a million of people. An injunction, which is not of right but of grace, should not be granted except in a clear case, and to arrest a palpable abuse of authority resulting in some irreparable in-

jury. "It is," said the present chief justice, 4 P. F. Smith, 171, "a high exercise of power, and should be cautiously exercised—an appeal to the extraordinary power of the court, and the plaintiff is always bound to make out a case showing a clear necessity for it—a necessity in the light of inability to be compensated for the wrong which would ensue if not arrested."

The special injunction is dissolved, and a preliminary injunction is refused.

[Legal Gazette, Feb. 4, 1870. Vol. 2, p. 35.]

Court of Quarter Sessions, Philadelphia County.

COMMONWEALTH v. MANDERFIELD.

1. An indictment for opening or managing, or setting up a lottery, must aver that it was an illegal lottery.
2. When the averment is that the defendant sold to a certain person named "a lottery policy intended to entitle the holder or bearer thereof to a prize in a lottery," &c., it brings the offence within the 53d section of the penal code of 1860, and is a sufficient allegation that the lottery is an illegal one.
Even if such pleading is argumentative it is a formal defect only, and good upon general demurrer.
3. Counts in an indictment merely charging defendant with unlawfully erecting and setting up, opening, and carrying on and managing a lottery, are bad on demurrer; they do not show that the lottery was illegal.
4. The statement in such counts that "a further description of which said lottery the grand inquest are unable to give," does not hold them; it is only an averment that the grand jury has not sufficient evidence before them to enable them to pronounce the lotteries illegal.

Sur motion to quash, and demurrer to indictment.

Opinion by PAXSON, J. Delivered February 16th, 1870.

The defendant was bound over by Alderman Kerr, upon the charge of selling lottery policies. An indictment was found against him by the grand jury, to which he has filed a general demurrer.

The indictment contains five counts.

The first count charges that the defendant "unlawfully and knowingly did expose to sale, and did cause to be exposed to sale, to Charles W. Wood, a certain written device and lottery policy, intended to entitle the holder and bearer thereof to a prize in a lottery, a further description of which said lottery the grand inquest are unable to give," &c., &c.

The second count charges that the defendant unlawfully did sell and cause to be sold to the said Wood a certain lottery policy, &c.

The third count charges the defendant with unlawfully and knowingly erecting and setting up a lottery, a further description of which said lottery the grand inquest are unable to give, &c.

The fourth count charges the defendant with opening a lottery, and the fifth count with being concerned in managing and carrying on a lottery.

Upon the argument the counsel for the defendant moved to quash the indictment upon the ground that it contained charges which are separate and distinct from the offence for which he was bound over, and punishable in a different manner.

In response to a question of defendant's counsel, the district attorney distinctly stated that this bill did not belong to the class known in our practice as "district attorney's bills;" that is, a bill sent into the grand inquest without a previous binding over, upon his motion, in the interests of public justice, and upon his official responsibility. But that the said bill was found in the usual way, in pursuance of a previous arrest and binding over. This motion must, therefore, be determined by the law as applicable to the latter form of proceeding.

The objection referred to cannot be urged against the first and second counts. The charge before the alderman was selling a lottery policy. This involves the charge of exposing it for sale. It could not well have been sold without having been exposed for sale. Nor do I think the remaining counts are objectionable upon this ground. It cannot be fairly said that the offences charged in the last three counts are not incident to, and arising out of, the original transactions, to wit, the selling of lottery policies. The district attorney is not bound by the exact phraseology of the alderman. He may mould his indictment to suit the facts of the case, so that he do not charge another and distinct offence—a different transaction having no connection with the act for which the defendant was bound over.

But it is urged that the counts are all bad upon demurrer, for the reasons—

First, That the indictment does not show upon its face that the lottery referred to was an illegal lottery; and,

Second, That the indictment does not contain any description of the ticket or policy sold.

It is clear that if certain lotteries are lawful, while others are prohibited by statute, the indictment must show that the lottery complained of belongs to the latter class, or it will be bad upon demurrer. It is equally true that if all lotteries are unlawful, the indictment need not charge or set out the kind of lottery, or the object for which it is set up.

The act of 17th of February 1762, which was the first upon this subject, declares all lotteries whatsoever to be common and public nuisances. This act was subsequently repealed, and its main provisions re-enacted by the act of 20th January, 1792, and this, in turn, by the act of 2d March, 1805, followed by the act of 1st March, 1833, declaring that every lottery and lotteries, device and devices in the nature of lotteries, shall be utterly and entirely abolished, and shall be unlawful. The lat-

ter act was materially qualified by that of March, 1847. The commissioners to revise the criminal code reviewed all the statute laws upon this subject in their report, see p. 21, and sections 52, 3, 4 of this code now contain all the law in reference to lotteries. Section 52 provides that "All lotteries not authorized by law, whether public or private, for moneys, goods, wares, or merchandise, chattels, lands, tenements, hereditaments, or other matters or things whatsoever, are hereby declared to be common nuisances."

The codifiers in drafting this section evidently contemplated that there might be such a thing as a lawful lottery. Otherwise they might well have said that all lotteries shall be unlawful, and have omitted the clause respecting moneys, goods, etc., etc., as surplusage. And yet, singularly enough, while the evident intention would appear to be to narrow the operation of the section to certain classes of lotteries, the terms of the act seem broad enough to include every description of them.

The term lottery must be understood to be used in the act in its general and known signification. Webster defines it to be "a scheme for the distribution of prizes by chance, or the distribution thereof." Johnson speaks of a lottery as "a distribution of prizes by chance; a play in which lots are drawn for prizes." Chambers' Encyclopedia defines a lottery to be "a game of hazard, in which prizes are drawn by lot;" and Bouvier's Law Dictionary is substantially to the same effect, as well as many other authorities.

Keeping in view the foregoing definitions of a lottery—that it is a scheme for the distribution of prizes by chance, it would seem to be difficult to set up such a thing as a legal lottery in Pennsylvania. We must not confound the decision of certain questions by lot with a lottery. One or two or more persons may be obliged to do a certain thing, or go to a given place upon a specified day, and they may legally decide by lot which of them shall do the said thing, or go to the said place. The members of a deliberative body may by lot determine their seats. A division of property under some circumstances may be made by lot, and yet not be a lottery. Sacred history contains several instances where property has been parted and divided by lot—Psalm xxii. 18, Matthew xxvii. 35; Acts i. 26; Leviticus xvi. 8. It is not every game of chance that will constitute a lottery. Human life has been said to be a game of chance, and some writers speak of it as a lottery. Shakspeare, Dryden, and other poets so refer to it.

But these and many other familiar instances that might be mentioned, have no reference to lotteries in the sense in which the term is used in the criminal law. The latter refers to something in which there are supposed prizes and certain blanks.

In the instances above referred to there is no drawing of prizes by chance, which is the very life and soul of a lottery. On the other hand, the disposal of any species of property, or, in the comprehensive language of the act of Assembly, and "other matters or things whatever," by any of the schemes or games of chance popularly regarded as innocent, come within the terms of the law. The raffles, which occur almost daily at the street corners, in bar rooms, at fairs, and at other places, are as clearly violations of the criminal law as the most elaborate and carefully organized lotteries by which the ignorant and credulous are swindled out of their hard earnings.

But while it seems to be difficult to define a legal lottery in this case, the act of Assembly referred to evidently contemplates that there may be such a thing, and because there may be a legal lottery it is necessary that this indictment should show upon its face that the lottery complained of was illegal. This point was expressly decided by Judge Ludlow in 1866, in the case of the *Commonwealth v. Carpenter*. I have been furnished with a copy of the opinion delivered in that case, and concur fully in the conclusion indicated therein.

But the first two counts of the indictment under consideration differ from the one in *Commonwealth v. Carpenter* in three material points, viz.:

First. In charging that the holder or bearer of the policy is entitled to a prize in a lottery.

Second. In setting out the name of the person to whom the policy was sold; and

Third. In stating that a further description of the said lottery the grand inquest are unable to give.

The averment in the bill that the policy entitled the holder and bearer thereof to a prize in a lottery, clearly stamps it as an illegal lottery. That is the very essence of the offence. The word prize, in this connection, means something to be drawn, usually money, as opposed to a blank. Whatever it may be, it is something of value, and is covered by the words in the statute, "or other matters or things whatever." If it be objected that the averment of the illegality of the lottery is stated argumentatively, it is sufficient to observe that argumentative pleading is a mere formal defect which is aided by verdict, and is good upon general demurrer. *The People v. Warren*, 4 Barb. 314, citing 1 Saund. 274; 9 John. 314, Gould's Pleading, 65.

In the case above cited the defendant was convicted of vending lottery policies, and an objection was made upon a writ of error to the sufficiency of the indictment. It was urged that it should expressly aver the vending of the tickets of a lottery established or set on foot for the purpose of disposing of real estate, goods, moneys, or things in action. The court say that

it should so appear, but that the averment that the ticket purported to entitle the holder to draw a prize in a lottery was a sufficient averment of the illegal character of said lottery, and is susceptible of no other meaning.

Tested by the ordinary rules of interpretation, and giving to the words "prize in a lottery," as charged in the first and second counts, their plain and obvious meaning, there can be no room to doubt that the lottery referred to in said counts is an illegal lottery within the meaning of the act of assembly.

The fifty-fifth section of the revised criminal code provides *inter alia* that "any indictment under this act shall be deemed and adjudged good and sufficient which describes the offence in the words of the law, although it does not set out the name or location of such lottery, nor set out in words or figures the ticket, policy, or device sold, bartered, or exchanged," etc., etc.

It was urged upon the argument that notwithstanding this section an indictment which does not describe the lottery or policy sold is bad, and a decision of this court by Judge Kelley, in 1847, is cited in support of this view. I find no report of this case beyond a brief reference in note D at foot of page 742 of Wharton's Precedents, 2d ed. This decision was made upon an indictment under the act of 1847, which is identical with the present statute, and to the extent of the principle it decides, is authority. But in that case Judge Kelley held that an indictment merely averring a sale of a policy, but not stating to whom, or mentioning the ticket, is not sufficient. In this case the indictment expressly avers that the policy was sold to Charles W. Wood, and also that the grand inquest are unable to give a further description of the said lottery.

The distinction between the cases is manifest. It is not necessary to set out the ticket sold or the names of the purchasers, it being alleged that the names are unknown to the jurors. *People v Taylor*, 3 Denio, 91. The rule that matters of description must be set out in the indictment must not be carried so far as to shield from punishment when it is plain that a crime has been committed, and therefore the indicting jurors are allowed to state that a particular fact, not vital to the accusation, is to them unknown. *Ibid*.

Here the offence is substantially charged when it is averred that the defendant sold a policy to Charles Wood, purporting to entitle the holder to a prize in a lottery, a further description of which said lottery is to the jurors unknown. It is sufficiently certain to enable him to know how to plead, and to what; and also to protect him from a further prosecution from the same offence by the plea of *autrefois acquit* or *autrefois convict*.

For the reasons indicated I do not think the first and second

counts of this indictment are bad upon demurrer. But, under the former decisions of this court, the third, fourth, and fifth counts are fatally defective. They come squarely within the ruling of Judge Ludlow in *Commonwealth v. Carpenter* before referred to. They charge merely the erecting of a lottery without anything to indicate that it is an illegal lottery. Nor will the averment that the grand inquest were unable further to describe the said lottery avail to save these counts. Said averment only establishes the fact that the grand inquest had not sufficient evidence before them to make them pronounce the lottery illegal. And while a decision of a case of this description upon a technical point of law is always to be regretted, yet in favor of the liberty of the citizen, the good of society, as well as our plain duty, requires us to administer the law as we find it, without regard to the character of the parties who may come before us, or the nature of the offences they are charged with having committed. In this particular case, its whole merits can be heard upon the first and second counts, which are sustained.

The motion to quash is overruled. The demurrer is overruled as to the first and second counts, and sustained as to the third, fourth, and fifth counts. There are seven of these cases in which the indictments and demurrers are similar. They have been argued and considered together, and the above judgment may be entered in each case.

As this case is one of considerable public interest and involves important principles of law, I have submitted it to the other judges of this court, all of whom concur in this opinion.

[Legal Gazette, Feb. 26, 1870, Vol. 2, p. 61.]

Court of Quarter Sessions, Philadelphia County.

COMMONWEALTH v. LANDIS.

1. What constitutes an obscene libel.
2. That which offends modesty and is indecent and lewd, and tends to the creation of lascivious desires is obscene.
3. Obscenity is determined by the common sense and feelings of mankind, and not by the skill of the learned, and is a question purely for the jury, in which they cannot be aided by the testimony of experts.
4. Obscenity does not depend on the truth or falsity of the matters published, but upon their tendency to inflame the passion and debauch society.
5. It is sometimes not only expedient but necessary to the proper administration of justice, that a judge should express his opinion on the evidence, but this should always be accompanied with the instruction to the jury that the facts of the case are for their determination.
6. If there be a doubt as to the obscenity of the publication, it is the duty of the jury to acquit.

Motion for a new trial.

Opinion by PEIRCE, J. Delivered January 22d, 1870.

The reasons for a new trial in this case are numerous, but they may all be disposed of under a few heads. They relate:

First. To the exclusion of evidence tending to show the scientific correctness of the book complained of, and the fitness of such a publication for general information.

Second. To an expression of opinion by the Judge as to the character of the book.

Third. To errors in charging the jury as to what constituted an obscene libel, and as to what extent a publication is protected as necessary for general information and conducive to the public welfare.

1. Physicians were called as experts to show the scientific correctness of the book and the necessity of such knowledge for general information.

I ruled at the trial that the book might be true and scientifically correct in its statements and descriptions, and yet be obscene; that its obscenity did not depend upon its truthfulness or falsity, but upon its tendency to inflame the passions and debauch society. The character of the book was a question purely for the jury, in which they could not be aided by the testimony of experts. Obscenity is determined by the common sense and feelings of mankind, and not by the skill of the learned. It was therefore a question for the jury, to be determined by their examination of the publication, and not by the opinions of others respecting it. That which offends modesty, and is indecent and lewd, and tends to the creation of lascivious desires, is obscene. Of this the jury were as competent to judge as the most accomplished experts in medical science, whose familiarity with the subjects treated of in the book might, perhaps, render them less susceptible to the emotions which would be excited in the general public by reading such a book.

2. Relative to the expression of opinion by the judge as to the character of the book, it was held by the Supreme Court in *Kilpatrick v. The Commonwealth*, 7 Casey, 198, that a judge may rightfully express his opinion respecting the evidence and it may sometimes be his duty to do it, yet not so as to withdraw it from the consideration and decision of the jury.

My own experience as a judge has taught me that it is sometimes not only expedient but necessary to the proper administration of law and justice that a judge should express his opinion on the evidence submitted to the jury. His greater familiarity with the rules of evidence, the weight of the testimony, and its application to the subject matter of investigation, requires that he should do so; but he should always accompany it with the instruction that the facts of the case are for their determination, under the evidence submitted to them.

In this case this instruction was repeated to the jury more

than once. They were told that they were not to take my opinion of the book, but were to determine its character from their own examination of it. Again, they were instructed that it was for them to determine the character of the book. If, in their judgment, the book was fit and proper for publication, and such as should go into their families, and be handed to their sons and daughters and placed in boarding schools for the beneficial information of the young and others, then it was their duty to acquit the defendant.

They were further instructed that if they had a doubt as to the obscenity of the book it was their duty to acquit the defendant.

This instruction left the whole question of the character of the publication to the jury. There was no controversy as to the publication of the book by the defendant, as its publication was substantially, if not in terms, admitted by him.

3. The next alleged errors relate to the charge of the court as to what constitutes an obscene libel, and to what extent a publication is protected as necessary for general information and conducive to the public welfare.

The jury were instructed that it did not matter whether the things published in the book were true, and in conformity with nature and the laws of our being or not. If they were unfit to be published, and tended to inflame improper and lewd passions, it was an obscene libel. That to justify a publication of the character of this book they must be satisfied that the publication was made for a legitimate and useful purpose, and that it was not made from any motive of mere gain, or with a corrupt desire to debauch society. That even scientific and medical publications containing illustrations exhibiting the human form, if wantonly exposed in the open markets, with a wanton and wicked desire to create a demand for them, and not to promote the good of society by placing them in proper hands for useful purposes, would, if tending to excite lewd desires, be held to be obscene libels.

That before a medical class, for the purpose of instruction, it might be necessary and proper and consonant with decency and modesty to expose the human body for exhibition of disease, or for the purpose of operation, but that if the same human body were exposed in front of one of our medical colleges to the public indiscriminately, even for the purpose of operation, such an exhibition would be held to be indecent and obscene.

The jury were further instructed that publications of this character are protected when made with a view to benefit society, and in a manner not to injure the public, but that a mistaken view of the defendant as to the character and tendency

of the book, if it was in itself obscene and unfit for publication, would not excuse his violation of the law.

After having listened to the elaborate and earnest argument of the learned counsel for the defendant, I do not perceive that there was error either in the admission or exclusion of evidence, or in the charge to the jury, and I think that the verdict is sustained by both the law and the evidence. The motion for a new trial is therefore overruled.

[Legal Gazette, March 4, 1870, Vol. 2, p. 67.]

Supreme Court of Pennsylvania.

AT NISI PRIUS. IN EQUITY.

BOYLE v. RAMSEY.

1. An Injunction will not be granted to restrain the sale of real estate alleged to be the wife's on an execution against the husband, unless in a case where clearly the husband can have no interest whatever.
2. Generally the question of his interest must be settled in an ejectment.
Hunter's Appeal, 4 Wr. 194, commented on.

Sur motion for injunction.

The bill set forth that in 1865 the house and lot in question had been purchased in the wife's name, with money "earned by the exertions of herself and husband," and which the husband had given her, "without reservation, as a provision for herself and children." That on a judgment obtained against the husband in February, 1870, this property was levied upon, and the plaintiff, in the execution, threatened to proceed and sell, and therefore an injunction is asked restraining him from so doing.

Opinion by THOMPSON, C. J. Delivered March 5th, 1870.

The grounds of the application for the injunction in this case is that the property levied on is that of the wife; but it appears by the bill that the moneys by which the purchase of it was made was the money and savings of the husband and wife together, and by the former given to the latter and invested in the property in question. The money came from the husband, for the earnings and services of the wife were his as well as his own earning and savings. It is true, if entirely out of debt at the time, he might make a present of the money to the wife; but, when property comes to a wife in that way, courts will not preclude the subsequent creditors of the husband from selling any alleged interest of his therein and testing that by ejectment, in which a trial by jury may be had. A notice of the wife's claim at the sale puts the risk on the purchaser, and if she make out her title on ejectment the purchaser will take nothing by his purchase; but we cannot restrain the execution where we see that a possibility of a

claim of the husband might exist. *Hunter's App.*, 4 Wr. 194, was an exceptional case. The property seized in that case came to the wife from her mother, that was admitted in the answer to the bill; but still the court thought its intervention in equity to prevent the sale was beyond its jurisdiction. We thought the contrary, because the pleadings showed an impossibility of interest in the husband, and hence we enjoined the sale as a mere speculative attempt to make money out of a sale when no possible interest could pass. That is not this case; the want of interest in the husband is not admitted here, and we cannot delay execution to try that question by a bill for injunction before sale.

Injunction refused.

Lucas Hirst, Esq., pro complainant.

Wencel Hartman, Esq., pro defendant.

[Legal Gazette, March 11, 1870, Vol. 2, p. 73.]

Supreme Court of Pennsylvania.

AT NISI PRIUS. IN EQUITY.

PLEISH v. HARTRANFT et al.

1. The act of Congress of February 10th, 1868, limits the right of the States to tax stocks of the national banks to the amount that "other moneyed capital in the hands of individual citizens of the State might be" taxed.
2. The words "other moneyed capital," are used in contradistinction to capital invested in stocks, &c., and mean that put into mere private or individual securities.
3. Admitting the constitutionality of the act of Congress, the State of Pennsylvania can levy no tax on national bank stock greater than that levied on mortgages, &c.
4. The act of Assembly of December 23d, 1869, is therefore unauthorized.

Sur motion for injunction.

Opinion by THOMPSON, C. J. Delivered March 5th, 1870.

I regard the act of Congress of the 10th of February, 1868, as exhibiting an important change in the provisions of the 41st section of the act of Congress of the 3d of June, 1864, as regards the terms of the limitation of the latter act upon State authority to tax national bank stocks. That limitation was two-fold, viz.: To the extent of the tax authorized by law to be assessed on "other moneyed capital in the hands of individual citizens of the State," and also that the tax so imposed should not exceed the rate imposed on stock banks chartered by the States.

This was a sort of scale to regulate the States in taxing the stocks of national banks. The first clause quoted, fixes the maximum of the tax which the State might impose on their stocks, to be the rate which it imposes on moneyed capital in the hands of its individual citizens; but if a less rate than this be the law in regard to the stocks of State banks, then that lesser rate would be the extent to which the state might go,

but no further, in taxing the stocks of national institutions. These provisions were deemed necessary to preserve equality between the national and State banks, and, at the same time, to prevent the States from excessive taxation of the national bank stocks. No better preventative of this could be devised than limiting the power to tax the national bank stocks to what the people were obliged to pay on money at interest. The representatives of the people, in the State Legislatures, would hardly be willing to increase the taxes their constituents were paying, to enable them to raise the tax on the stocks of these banks, as they might do if the rate were not to be imposed on the stocks of State banks.

By the act of 10th February, 1868, the limitation was simplified; the clause of the act of 1864, is left out, which limited the taxes which might be imposed on the national bank stocks to no greater amount than that imposed by the State on the stock of its own bank. That is dropped, and the limitation is now, therefore, simply to the extent of the tax authorized to be assessed on other moneyed capital in the hands of individual citizens of the State.

The thing to be ascertained now, is what these words mean. The first portion of the section in the act of Congress in which they occur, was devoted to regulating the right, and the manner and place where the national bank stocks should or might be taxed by the States, and then comes the limitation that they may be taxed to the extent that "other moneyed capital, in the hands of individual citizens of the State might be." "Other moneyed capital," is an expression used in contradistinction to capital invested in stocks, of which the section had been treating. It means the money of individuals segregated, and not as aggregated. It is this which gives such effect to the limitation already noticed, and so it was thought in *The People v. The Commissioners*, 4 Wall. 244, Nelson, J., delivering the opinion of the court. It was there regarded as an effectual and fair limitation, not likely to be excessive, when, to be so, it must be equally so upon the people.

If Congress may limit the sovereign power of a State in regard to the taxing power on stocks of what are denominated national banks, and that is a matter not questioned here, and may not be anywhere, I cannot hesitate at all in regard to the effect of the act of the General Assembly of this commonwealth, approved the 22d of December, 1869. It greatly transcends the limits of the act of Congress of February 10th, 1868. By this act the State could tax these national bank stocks only to the extent that the people are taxed for money at interest, viz.: three mills on the dollar. That is the extent to which money at interest on bonds, mortgages, &c., &c., were liable to taxation

by the acts of Assembly of this commonwealth, and this I hold to be the test. It was not competent for the Legislature, regarding this limitation of their power by Congress as valid, to increase the tax on the stocks of State institutions, and then bring up the tax on national bank stocks to that standard. It was not competent to do so, for no such limitation is in the act of 1868. Nor would it have been under the act of 1864, for, as already said, I regard the limitation in that act to be to the extent of the tax to be paid on money, by individual citizens, as the *maximum* to which the States could go in taxing these stocks, and liable to be reduced below that by a system of taxation on the stocks of State institutions falling short of that. The only standard of taxation now, however, is the act of 1868, "to this extent, no more," can the State go. Our law taxed money at interest belonging to individual citizens, at three mills, when that act was passed. The act of Assembly adds seven-mills to this sum. This is unauthorized, and as sections second and third of the act of December, 1866, authorized no diminution of the rate or amount of the tax authorized to be assessed and collected from the holders of national bank stocks, I can do nothing but enjoin as prayed. Let a decree for an injunction be entered, to stand until further order, and let the writ issue. Bail in \$1,000, to be approved by the prothonotary.

[Legal Gazette, Mar. 11, 1870, Vol. 2, p. 77.]

Court of Common Pleas, Philadelphia County.

IN EQUITY.

GIVIN v. GIVIN et al.

A receiver is an officer of the court, and may apply to it for direction in a proper case; but where the court have directed him to sell part of the property, of which he is the receiver, at auction, he himself must see to the details of the sale, and to the collection of the price at which the property was knocked down.

Sur petition of Mahlon Fox, receiver.

Opinion by PAXSON, J. Delivered March 5th, 1870.

The petition of Mahlon Fox, receiver in the above case, has been presented, praying for the advice and direction of the court.

The petition sets forth the fact that he has sold under the order and direction of this court, the partnership property of the defendants, consisting of a leasehold interest in a brick-yard, and the movable property therein, for the sum of \$847.57. The terms of the said sale were cash on delivery. That Joseph Singerly became the purchaser of the leasehold interest and a portion of the movable property, for the price or sum of \$579.80, but that the said Singerly refuses to pay therefor upon the

ground that he is the landlord of the said premises, and that the tenants (the above defendants) are indebted to him for rent in a sum exceeding the amount of his purchases at the said sale. We are asked to instruct the receiver whether he shall sue Mr. Singerly for the amount of his purchases at said sale, or whether he shall allow the claim of the latter for rent as a set-off.

As a receiver is an officer appointed by the court, and is under our control, he may in a proper case apply to us for advice and direction. Thus, we have instructed him to sell this partnership property by auction. But there, as to any matter connected with the sale, our instructions cease. As to all the details of the auction he must act upon his own responsibility under the law. It is his duty to see that the sale is conducted in a legal manner, and when purchasers fail to comply with the terms of sale, he must pursue such remedies as the law points out. If the purchaser of any particular articles fail to pay therefor, he can refuse to deliver them, and re-sell them at his risk. If he make delivery without prior payment, he must take the responsibility. We decline to give any advice or direction in the premises.

[Legal Gazette, March 18, 1870, Vol. 2, p. 85.]

Court of Quarter Sessions, Philadelphia County.

In re LOUIS E. ROSENBERG, an alleged lunatic.

1. An application for the admission of an alleged lunatic to a hospital must be made by his *legal* guardian, or his relatives or friends where he has no legal guardian.
2. The word "resident" in sec. 17, act 13th June, 1836, as applied to a lunatic, means a person who is dwelling for the time in this State.
3. An application signed by one who is the committee of the alleged lunatic, duly appointed in another State, is not sufficient under the law, such committee has no power over a lunatic "resident" in Pennsylvania.

Sur habeas corpus.

Opinion by ALLISON, P. J. Delivered March 19th, 1870.

The testimony in this case establishes in the clearest manner that the relator is not of sound mind, and that he is a proper subject for medical treatment for the mental disorder with which he is afflicted. The testimony of Drs. Kirkbride and Jones, of the Pennsylvania Hospital for the Insane, is clear upon this point; and if we add to what they have said upon the subject, the testimony of the eminent medical gentlemen who made a protracted and critical examination of the relator, for the purpose of testing his sanity or insanity, we can have no room for doubt that it is every way judicious to place him under the care of those who are competent to give him the advantage of great experience and acknowledged skill in the treatment of persons afflicted with mental unsoundness. Doctors Gerhard, Pepper, Ray, Fricke, and Keller, gentlemen of integrity, ranking

with the most eminent in the profession of medicine in Philadelphia, agree that upon some subjects his mind is in an unnatural and unhealthy condition; that his delusions are clearly marked; and that it is best for the patient that he should remain where he now is for treatment, with a view to his restoration. Several of them say in their opinion, it would not be safe to the community, and all agree that it would not be safe to himself, if he were allowed to go at large, free to control his own actions and to follow the inclinations of a mind off its balance, and impressed with the belief of the existence of a conspiracy to restrain him of his liberty for the purpose of getting wrongful possession of his property.

The testimony of Dr. Ridgely established the fact that the relator meditated the taking of his own life. Asked the witness to procure poison for him, to be used for this purpose, saying that he wished to take his life to prevent the physicians from killing him. Asked for prussic acid, and offered to give money and other property to the witness, if he would get it for him.

If we are to be governed by the testimony, the conclusion is irresistible that Doctor Rosenberg requires care and treatment such as he will receive in the institution in which he has been placed—but one physician, Dr. Bascom, differing in opinion with all the others, and he admitting that he had not made a critical or accurate examination of the patient.

It is, however, claimed that the relator is entitled to his discharge, because of the want of a proper legal authority to receive him into the hospital, at the time at which he was taken there by his brother and the physician in charge of the Jewish Hospital in this city. The return to the writ asserts the presentation to Dr. Jones of a copy of proceedings in lunacy, taken before a judge of the Probate Court, of Cuyahoga county, Ohio, under which Dr. Rosenberg was declared to be insane. Dr. Jones at first refused to receive the relator, but afterwards consented to his remaining in the hospital, with his brother, until the necessary papers could be obtained from Cleveland. The same day the brother left the city of Philadelphia without notice to the officers of the institution, and subsequently sailed for Europe. Under these circumstances, and the conviction in the minds of the physicians in charge of the hospital, that Dr. Rosenberg was insane, it was deemed by them advisable to take care of him until the necessary papers were sent to them. The certificates required by the act of 20th April, 1869, were received on the 27th day of November last. Dr. Rosenberg having been taken to the institution on the 12th of that month. The return further sets out, that Dr. Rosenberg was then regularly entered on the books of the hospital as a patient; that he had been an

inmate of hospitals for the insane in the Western States, and that the reason for bringing him to this city was, that one of the asylums situate in the State of Ohio had been destroyed by fire, and that the asylum at Cleveland was for this reason full, and therefore unable to receive him. That the regularly appointed committee, or guardian, of Louis E. Rosenberg, approved of his being placed in the Pennsylvania Hospital, and desires that he should be kept where he now is.

The act of the 20th of April, 1869, provides, in the first section, that insane persons may be placed in a hospital for the insane by their legal guardians, or by their relatives or friends in case they have no guardians, but never without the certificate of two or more reputable physicians after a personal examination, made within one week of the date thereof; and this certificate to be duly acknowledged and sworn to, or affirmed, before some magistrate or judicial officer, who shall certify to the genuineness of the signature, and to the respectability of the signers.

The certificate of the physicians and of the justice of the peace is in strict compliance with the requirements of the first section of the act of 1859, but there is a radical defect in the application to admit Dr. Rosenberg to the Pennsylvania Hospital. The application is required to be made by the legal guardians of the alleged lunatic, or by their relatives or friends in case they have no guardian. The act of the 13th of June, 1836, section 17, Purdon 682, declares that the appointment of any committee, trustee, guardian, or the like, by any authority out of this commonwealth, shall not authorize the person so appointed to control the person or estate of any lunatic or habitual drunkard resident within this commonwealth, or to control the real estate situate within this commonwealth of any lunatic or habitual drunkard, whether resident within this commonwealth or otherwise.

The application is signed by Adolph Rittberg, who was appointed committee or guardian by the Probate Court of the State of Ohio. This appointment, though good in Ohio, is made of no effect in Pennsylvania; the act just cited says, in so many words, that such appointment shall not authorize the committee to control the person or estate of a lunatic resident in Pennsylvania. A resident is defined to be a person dwelling or having an abode in a place for a continuance of time, but not definite. An illustration given is that of a public minister, who resides at a foreign court. It is entirely distinct from the legal signification of the term residence, which implies settlement, which in contemplation of law is a question of intention. The term as applied to a lunatic brought within this commonwealth excludes the idea of intention; for one found to be a

lunatic, is incapable of forming an intention to reside anywhere, in the sense of acquiring thereby a legal residence or settlement. It can have therefore no other meaning as employed in the act of 1836, in its application to a person declared to be a lunatic before he came within the commonwealth, and who continues to be of unsound mind, than as meaning a person who is living or dwelling for the time in Pennsylvania.

The object contemplated by the act of 1836 seems to be to prevent a committee or guardian who is beyond the jurisdiction of the courts of the commonwealth, who cannot be reached by their process, who has not given security here for the faithful administration of his trust, from exercising any control over either the person or the property of a lunatic within this State.

Mr. Rittberg, who is represented to be a gentleman of respectability, being a foreign committee, possesses no legal authority in Pennsylvania, and was therefore incapable of making application for the admission into the Pennsylvania Hospital, or in any way controlling the person of Louis E. Rosenberg within this commonwealth. The act requires the application to be made by the *legal* guardian, or relatives or friends. This, of course, means the legal guardian of the jurisdiction, not one whose acts are declared by statute to possess no legal authority with us.

This conclusion renders it unnecessary to proceed further in considering the other question, upon which this application is based. But I think it is well to add that the criticism upon what has been called a violation of the act of 1869, in receiving Dr. Rosenberg without the proper certificate, is more plausible than sound. The return shows that he was not placed in the hospital in the sense in which the word is employed in the act of 1869, before the 27th of November, the day on which the certificate of the physicians was received. There could be no placing of the patient without the consent of the hospital authorities, and the return, which is in no way contradicted, asserts that he was refused admission as a patient prior to the 27th of November. Whilst waiting for the necessary certificates, the return alleges that permission was given to the brother of Dr. Rosenberg to remain with the doctor until the proper authority could be procured. And that, in violation of his agreement, the brother went away secretly, and left the doctor in the asylum. The authorities of the hospital would have been legally justified in turning the relator out of the institution, but whatever might be said of such conduct, as a compliance with the letter of the law, the inhumanity of such an act would not be doubtful, and might have been attended with consequences the most serious to Dr. Rosenberg.

I cannot but regret the necessity which would require me to

discharge the doctor from the institution in which he now is. An institution second to none of its kind in this country, which is under wise management; with one at its head, whose learning, skill, great experience, and humanity, are confessed by all who have knowledge of him. I am fearful Doctor Rosenberg will greatly be the loser if he is removed from the asylum; the consequences may be to him the worst that can be contemplated, but if he is not legally in the institution, there is no alternative but to decide the question as it is presented to us.

The embarrassment under which I am placed is to determine what order to make at this time. I cannot turn him loose to run at large at the risk of doing injury to himself, or possibly to others. The suggestions which have presented themselves to my mind are to remand the defendant until the committee in Ohio can be notified to come to Philadelphia, with the view of being appointed committee of Dr. Rosenberg here, which would enable him to make application in proper form for his reception as a patient into the hospital, where he now is, or if he deems it advisable, remove him to the State of Ohio for treatment there, or to proceed under the sixth section of the act of 1869, to appoint a commission to inquire into the question of the insanity of the relator, for the purpose of reaching a proper disposition of Doctor Rosenberg, either here or in the State from which he was brought.

For the present, therefore, the relator is remanded, and suggestions are invited from counsel as to what course they may deem it best should be pursued.

[Legal Gazette, March 25, 1870, Vol. 2, p. 91.]

Court of Common Pleas, Philadelphia County.

IN EQUITY.

WHETHAM v. CLYDE.

1. Equity will not enjoin where the plaintiff's case is a doubtful one.
2. Where the plaintiff alleged a parol agreement by which the purchase by the defendant of a certain leasehold interest was to enure to his benefit which the defendant denied.

Held, That such agreement not being in writing was within the act of 1856.

3. As there was no proof that the plaintiff had paid any share of the money, or that any fraud was practised, nothing in fact beyond that mere breach of a parol agreement, there was no resulting trust, nor was the defendant a trustee *ex maleficio*.

Bill dismissed with costs.

Sur motion for injunction.

Opinion by ALLISON, P. J. Delivered April 2d, 1870.

The equity of plaintiff, as set forth in his bill, is flatly denied by the defendant. Every material assertion is contradicted. The case stands upon the motion for the preliminary injunction, upon the affidavits in support of the bill, and a full answer by counter affidavits. This is conclusive against the

motion for special injunction. There are no considerations of pressing urgency, which render it necessary to depart from the rule so well established, as to the effect of a full denial of the ground upon which plaintiff places himself, in his application for relief, by special injunction, as to require us to make this case an exception to the rule. The denial is full and the facts alleged, are not before us, so as to be free from doubt.

The plaintiff asserts that defendant purchased from the city leases of premises No. 14 North Delaware avenue, and Pier No. 2, fronting on the Delaware river, for the joint interest of both the parties to this proceeding. That the agreement was that the leaseholds of the premises should be made to the plaintiff, upon averaging prices, compared with former rents paid by plaintiff, as tenant under prior leases from the city. If a promise was made such as is asserted in the bill, it was not in writing.

If the plaintiff's case stood without contradiction, would he be entitled to the relief which he prays may be accorded to him? It seems clear that the act of Assembly of April 22d, 1856, settles the question against his right to relief in a court of equity. The fourth section enacts "that all declarations or creations of trusts, or confidences of any lands, tenements, or hereditaments, and all grants and assignments thereof, shall be manifested by writing, signed by the party holding the title thereof, or by his last will in writing, or else to be void."

It is not pretended that the alleged declaration or agreement to purchase and hold the leasehold estate in the lands for plaintiff was in writing, nor can it be set up successfully that it is within the proviso which excepts from its operation, resulting trusts such as the law implies.

A resulting trust is raised only from fraud in obtaining title, or from payment of purchase money when the title is acquired. There are no facts alleged such as would make Clyde a trustee *ex maleficio*. All that is charged is a violation of a promise not in writing. This does not carry with it the slightest implication of fraud in the purchase, nor is any pretended, which in *Barnett v. Dougherty*, 8 Casey, 371, was held to be essential to make the holder of the title a trustee. In that case the offer was to prove that the defendant bought with knowledge, that his grantor had purchased the property in dispute at sheriff's sale, as the agent of the plaintiff; and the court say it was nothing more than a violation of an alleged promise, either implied or expressed, which is of no avail to induce a chancellor to decree the purchaser to be a trustee. *Jackman v. Ringland*, 4 W. & S. 149, and the cases there collected, are relied on, for the principle on which the decision is rested.

In *Kellam v. Smith*, 9 Casey, 158, the same doctrine is main-

tained. *Barnett v. Dougherty*, is affirmed, and in the opinion of the court the principle at foot of page 164 is thus stated: "When the purchaser at sheriff's sale promises to hold for the debtor, and afterwards refuses to comply with his engagements, the fraud, if any, is not at the sale, not in the promise, but in its subsequent breach." And further it is abundantly settled that equity will not decree such a purchaser to be a trustee, unless there is something more in the transaction than the mere violation of a parol agreement.

In *Beegly v. Mentz*, 5 P. F. Smith, 369, it was held that a resulting trust grew out of a promise to allow plaintiff to retain part of a tract of land bought by defendant at a judicial sale, upon an agreement to waive his claim of \$300 exemption in the land. The case was put on the express ground that the agreement was not to acquire a new interest by parol; the defendant had both a legal and equitable right to retain so much of the land as would be worth \$300. That his release of his claim on the land was equivalent to payment of that amount of the purchase money, from which the law raised by implication a trust in his favor.

The authorities cited in support of the claim of the plaintiff, have relation chiefly to the law as it was established prior to the passage of the act of 22d of April, 1856. It had been repeatedly held, that a trust need not be in writing, but this was swept away by the act referred to, except as to trusts which arise by construction or implication of law.

The affidavits of the defendant Clyde disclose the fact that Whetham was the owner of shedding on the pier, and that the defendant promised if he became purchaser to protect Whetham's interest in the shedding. This is not made by plaintiff a part of his case by bill, nor is it asserted in his affidavits. The defendant confesses his promise; for its enforcement Whetham has an ample remedy at law. There is no fraud in this, nothing which looks like an intention not to comply with the promise; and there is therefore no non-fulfilment of an inducement which could have led Whetham to consent to the purchase of the leaseholds by Clyde. But whatever promise may have been made, there was no relinquishment of anything by Whetham, for he had no interest in the land to give up. His leases had expired, and he had no claim, legal or equitable, to their renewal. This places the case of plaintiff, upon his own showing, clearly within the operation of the act of April 22d, 1856, being a naked promise, and not in writing, it is declared by the law to be void. This takes the case out of equity, and requires not only that the special injunction be refused, but that the bill be dismissed. And it is so ordered. *E. K. Price, Esq.*, for plaintiff. *J. G. Johnson, Esq.*, for defendant.

Court of Quarter Sessions, Philadelphia County.

In re FANNY PRATT, a minor.

1. A mother cannot appoint a testamentary guardian in Pennsylvania.
2. Where a great aunt seeks to obtain the custody of an orphan child by *habeas corpus*, on the ground of relationship, against one who is not related to the orphan, but to whose care the child was committed, the court will consider the religion of the parties.
3. Where the relator is of a different religion from that of the child's deceased parents, and has been appointed guardian by the Orphans' Court, without notice to the respondent, or to the court, of the religion of the parties and of the pending writ of *habeas corpus*.
Semble, that the proper practice is to move to vacate the appointment.

Sur *habeas corpus*.

Opinion by ALLISON, P. J. Delivered March 23d, 1870.

Rachel Pierce, the great aunt of Fanny Pratt, asks that the court will give into her custody the minor, who is nine years old, and whose parents are dead. Jane Ash, to whom the writ is directed, and who is not of the blood of the minor, resists the application upon a request of the mother, who was the surviving parent, that she would take charge of Fanny after her death. This constitutes no legal claim. A mother in Pennsylvania cannot appoint a testamentary guardian for her child. Nor is the indenture of apprenticeship which was exhibited on the hearing, valid, because of the want of proper parties.

The claim of Rachel Pierce rests upon her relationship and upon her appointment as guardian by the Orphans' Court of this city. The application for this appointment was made after the writ of *habeas corpus* had issued, without notice to the respondent, and without communicating to the court the fact of the pending writ. If this had been done, the guardian would not have been appointed until the determination of the question in the Quarter Sessions. Nor would Mrs. Pierce have been allowed to take the office upon herself, she being a Protestant, and the evidence establishing the fact that both father and mother of the child died in the Catholic faith. The act of the 29th of March, 1832, section 5, requires "that persons of the same religious persuasion as the parents of minors shall in all cases be preferred by the court, in their appointment." This principle was embodied in the Statute of 12 Anne, C 3, which was in force in this State; and as early as 1785, in the case of *Graham's Appeal*, 1 Dall. 156, it was held that it controlled the legal discretion of the Orphans' Court in the appointment of guardians. In *McCann's Appeal*, 12 Wright, 304, this court, per Thompson, P. J., is reported to have held that the act of 1832 prohibited the Orphans' Court permitting an orphan over the age of fourteen choosing a guardian who belonged to a denomination of Christians different from that to which the deceased parents belonged. The Supreme Court

affirmed the decision, upon the ground that the exercise of the legal discretion which is vested in the Orphans' Court in the appointment of guardians is not the subject of review by a court of error, which would seem to imply that the principle had been stated somewhat too strongly by this court. And this is evidently the view of the law entertained in *Nicholson's Appeal*, 8 Harris, 50. The court say the law which forbids the appointment of a guardian whose religious faith differs from that of the parents should be most strictly obeyed wherever it is practicable, for reasons so many and so obvious that they need not be repeated. But it is no cause for discharging one from a trust with which he is already clothed. A guardian can only be removed for mismanagement or misconduct, and certainly a man's religious belief is neither the one nor the other. The Orphans' Court, by the terms of the act, are required to give a preference (other things being equal) to one holding the same faith as the parents held while living, but not to make the consideration override all others. There is a discretion vested in the Orphans' Court, which, when exercised, cannot be reviewed. As Judge Black, in *Nicholson's Appeal*, says, it is to be done whenever it is practicable.

Recognizing this obligation as resting upon the Orphans' Court, I am justified in saying that for this reason Mrs. Pierce would not have received the appointment of guardian if the court had been advised of the fact that the mother, who was all her life a Catholic, died with the injunction that Fanny should be trained in that faith, and that the father, who, though he was born and grew up a Protestant, before his death was received into the Catholic church by baptism and communion, and who, by a diary kept by him subsequently, appears to have been regular in the observance of the requirements of that church, such as attending mass and going to communion.

The proper disposition to be made of this case is to suggest to the respondent that application be made by her to the Orphans' Court to vacate the appointment of guardian improvidently made, which was obtained by withholding from the court information that ought to have been communicated, so that an intelligent discretion might have been exercised, and the law respected and carried into effect. In *Nicholson's Appeal*, the court say a guardian can only be removed for mismanagement or misconduct, but this relates only to causes of complaint against the guardian, such as is contemplated by the act of Assembly—abusing or neglecting his trust. Above all this, there is a power vested in every court to protect itself; to correct its own mistakes; to relieve itself from the consequences of action based on a statement not in accordance with the facts,

or upon the withholding of information material to the question to be decided. We have gone so far as to open a decree of divorce after the death of one of the parties, for reasons analogous in principle, which was sustained by the Supreme Court; and we have no doubt of the power of the Orphans' Court to review what it has done, and to set aside its own decree, if it be necessary by so doing to vindicate itself and carry into effect the law of the land.

If the present guardian shall be removed, the way will be open for the appointment of a person of the same religious persuasion with that of the parents of Fanny Pratt, to whose custody she can be awarded, who would be entitled to the control of her person, and the care of her education and religious training. This of course would not give to the guardian any rights in this respect different from those which the law recognizes. He would at all times be under the control of the Orphans' Court, whose jurisdiction extends to, and embraces the appointment, control, removal and discharge of guardians. For sufficient cause the child may be taken away from him and given to an entire stranger; and this may be done with the child of a parent in full life, but it is every way desirable that the guardian should exercise the functions and perform the duties of his office, unless the strongest reasons exist to the contrary.

Until further order, Fanny Pratt is remanded to the custody of Jane Ash, to abide the final disposition of the pending question.

Mr. Coxe, for the writ.

Thos. R. Elcock, Esq., contra.

[*Legal Gazette*, Apr. 2, 1870, Vol. 2, p. 109.]

Court of Common Pleas, Philadelphia County.

IN EQUITY.

SMITH v. SCHMIDT.

1. Where the evidence is conflicting and the court are unable to determine on which side it preponderates, a preliminary injunction will be dissolved, and the parties sent to their remedy at law,
2. In such case each party should pay his own costs.
Boyle v. Ramsey (page 45, preceding), followed.

Opinion by LUDLOW, J. Delivered April 8th, 1870.

A very careful consideration of the evidence in this case, and of the arguments of counsel, has failed to produce any clear conviction as to the real truth of the facts sought to be established by either the plaintiff or defendant.

We see much, in the very able printed argument of the coun-

sel for Mrs. Smith, which tends to shake the testimony of the chief witness for the defendant, and, coupled with the other testimony for plaintiff, might induce us to make the injunction perpetual. On the other hand, we cannot forget that the most important witnesses for plaintiff, although competent to testify, have a deep interest in fact in the result, while a portion of the testimony of defendant bears upon its face evidence of truth, and cannot be disregarded.

Under these circumstances it would clearly be our duty to refer the case to a jury, and after a trial and verdict proceed to make a final disposition of the case. We would without hesitation take the course just suggested, but for a decision which, although pronounced at nisi prius, has that weight which ought always to be given to a deliberate opinion of one of the judges of the Supreme Court.

In *Boyle v. Ramsey*, Legal Gazette, Vol. II., No. 10, Chief Justice Thompson refused an injunction in a case which in principle is identical with this cause.

It was there held that an injunction will not be granted to restrain the sale of real estate alleged to be the wife's on an execution against the husband, unless in a case where clearly the husband can have no interest whatever, the question must be settled by an ejectment. When the present bill was filed it was supposed that *Hunter's Appeal*, 4 Wr. 194, ruled the case, but in *Boyle v. Ramsey* it is said that that case was an exceptional one, and turned upon the fact that the pleadings showed *an impossibility of interest in the husband*. As a fact no such impossibility exists here, and "a notice of the wife's claim at the sale puts the risk on the purchaser, and if she makes out her title on ejectment the purchaser will take nothing by his purchase."

As a jury ought in any event to decide the question in dispute, we see no reason why a verdict in ejectment will not be as satisfactory as any others.

We have concluded, without prejudice to the parties to this suit or either of them, to dissolve the injunction and dismiss this bill, but, under the circumstances, each party ought to pay his or her own costs.

Injunction dissolved and bill dismissed.

Horatio Hubbell, Esq., for plaintiff.

Walter B. Mitchell, Esq., for defendant.

[Legal Gazette, April 22, 1870, Vol. 2, p. 124.]

Supreme Court of Pennsylvania.

AT NISI PRIUS. IN EQUITY.

CHAMBERS v. WATERMAN.

1. The *ex parte* allowance of an amendment to a bill after plea or answer and before replication, under Equity Rule 1, does not conclude the defendant, and upon motion the court will consider and determine whether the amendments are such as should have been allowed.
2. Amendments to a bill will not be allowed where they make a new cause of action, and are inconsistent with and repugnant to the case made by the original bill.

This was a motion to discharge an order to amend, allowed at nisi prius, January 15th, 1870, under the 50th rule, on an *ex parte* application by plaintiff's counsel to amend his bill. Defendants had filed a plea and answer, but no replication had been put in. The amendments were filed January 18th, 1870, (the original bill on 8th February, 1864,) and on 2d February, 1870, defendants moved to discharge the order to amend, and take the amendment off the file.

The form of the motion is that sanctioned by the usage of the courts of equity in England. See *Campbell v. Joyce*, 2 Law Rep. Equity, 379.

Opinion by SHARSWOOD, J. Delivered April 23d, 1870.

Very great latitude is certainly permitted in amendments to a bill. They are not confined to merely formal defects, but extend to new matters and matters of substance, even so as to vary the relief prayed for, if the cause is in such a stage that they can be properly introduced. But this has never been carried so far as to allow an entirely new bill to be filed, setting up matter inconsistent with, or alien, or repugnant to the case, as made in the original bill. It would introduce the utmost disorder and complication, nor is it at all necessary for the rights of the parties. Unless the plaintiff shows some good reason or excuse for not having made it a part of his original bill, a substantial amendment varying the case ought never to be permitted, except upon the payment to the defendant of his costs incurred up to that time, and it seems very clear that as to all substantial equities, the controversy must be decided as if the amended bill had been originally filed as of the date of the amendment. So far as the pendency of a suit can affect either the parties to it, or strangers, matter brought into the bill by amendment, will not have relation to the time of filing the original bill, but the suit will so far be considered as pending only from the time of the amendment. *Long v. Burton*, 2 Atk. 218; *Holmes v. Trout*, 1 McLean, 1.

Without examining all the cases, I consider *Shields v. Barrow*, 17 Howard (S. C.), 130, as an authority in point. That was a bill filed by a vendor for the rescission of an agreement

into which he had entered to take back the property, and praying to be restored to his rights under the original sale. The defendants put in answers insisting on the compromise, and one of them filed a cross bill praying for its specific execution. The plaintiff then obtained leave to amend his bill, by inserting a prayer that if the court should be of opinion that the compromise was valid, and should not be set aside, that its performance should be decreed. It was held that the amendment ought not to have been allowed. Mr. Justice Curtis said: "A bill may be originally framed with a double aspect, or may be so amended as to be of that character. But the alternative case stated, must be the foundation for precisely the same relief, and it would produce inextricable confusion if the plaintiff were allowed to do what was attempted here. Nor is a plaintiff at liberty to abandon the entire case made by his bill, and make a new and different case by way of amendment. We apprehend that the true rule on this subject is laid down by the Vice Chancellor, in *Verplank v. The Mercantile Insurance Company*, 1 Edwards, Ch. R. 46. "Under the privilege of amendment, a party is not to be permitted to make a new bill. Amendments can only be allowed when the bill is found defective in proper parties, in its prayer for relief, or in the omission or mistake of some fact or circumstance connected with the substance of the case, but not forming the substance itself, or for putting in issue new matter to meet allegations in the answer. We think sound reasons can be given for not allowing the rules for the practice of the Circuit Courts respecting amendments, to be extended beyond this, though doubtless much liberality should be shown in acting within it, taking care always to protect the rights of the opposite party. To strike out the entire substance and prayer of a bill, and insert a new cause by way of amendment, leaves the record unnecessarily encumbered with the original proceedings, increases expenses, and complicates the suit. It is far better to require the complainant to begin anew. To insert a wholly different case, is not properly amendment, and should not be considered within the rules on that subject."

This reasoning appears to me to be unanswerable, and it is to be remarked that the rules in equity of the Supreme Court of the United States, on the subject of amendments, do not materially differ from those adopted by the Supreme Court of this State. This amendment was allowed on an *ex parte* motion without notice, and I cannot consider it as *res judicata* so as to preclude the court from reviewing its action. It stands, in that respect, like an amendment before answer which is of course: whether it is an amendment at all or a new bill under the guise of an amendment, must be an open question. This motion

therefore seems to me a proper one and in conformity with chancery practice.

In any point of view I cannot help regarding the amendment in question as substantially a new bill. The original bill was filed by the plaintiff, "for himself and all others, the creditors and stockholders of the Montour Iron Company, who may choose to come in and become parties to this suit and to contribute to the expenses thereof." A creditor's and stockholder's bill is in effect a bill by and for the corporation, sustained because the corporation is either unable or unwilling to prosecute its claims for the benefit of its stockholders and creditors. This should be charged in the bill and the company should be made defendants, or some sufficient reason alleged for not making them so. In this respect this original bill was defective, but no doubt it was amendable, and may be considered as though it had been amended. I will not say that such an allegation may not be stricken out if it appears to have been a mere mistake, and the claim of the plaintiff to have really been in his individual capacity. But here the whole frame of the bill accorded with the form in which it was commenced. After setting forth the breach of trust by the defendants, which was the gravamen of the complaint, he charges that the profits realized by them, "but for the fraudulent betrayal of their said trust by the said Waterman and Beaver, would, after paying all the debts of the said Montour Iron Company, have been distributed among the stockholders thereof, including said complainant," and then proceeds to allege that he is both a creditor and stockholder of that company. "He expressly charges and avers that upon an account it will appear that large sums are due to him and other stockholders of the company."

The amended bill claims not as a creditor and stockholder of the Montour Iron Company, but as a creditor of the defendants under an agreement of February 5th, 1858, set out and referred to, indeed in the original bill as a part of the history of the transaction; under which, as alleged, in consideration of the assistance, attention and services of the plaintiff and other associates with him, in the conduct and management of the business of the said trust—they were to receive a certain amount of the stock of a new company to be formed, and a certain other amount was to be held for the joint benefit of all parties interested. He prays therefore an account of the administration of the trust created by this agreement, so I read this bill. To my mind the equity of it is manifestly alien, repugnant to and inconsistent with the original ground of complaint. Instead of allowing such an amendment, in the language of the Supreme

Court of the United States, "it is far better to require the complainant to begin anew."

Motion granted.

Saml. Dickson and R. C. McMurtrie, Esqs., for the motion.

J. Howard Gendell and E. Spencer Miller, Esqs., contra.

[Legal Gazette, April 29, 1870, Vol. 2, p. 129.]

Court of Quarter Sessions, Philadelphia County.

COMMONWEALTH ex. rel. TERRY v. DOUGHERTY.

1. A parent may relinquish the right of custody of his child by parol.
2. Where the right to the custody of a child is doubtful the court may regard its interests and wishes.
3. Where a father gave the care of his infant daughter to the sister of its deceased mother, and afterwards only visited it about once a year and never contributed to its support, and, after the lapse of eight years claimed the custody of the child, *Held*: That such facts evidenced an abandonment of the father's right.

Sur habeas corpus.

Opinion by PAXSON, J. Delivered May 28th, 1870.

William Terry, the relator, sues out this writ of habeas corpus, to obtain the custody of his child, — Terry, aged about eleven years, and who is now, and has been for eight years last past, in the care and custody of her maternal aunt, and her husband, Wm. Dougherty, the respondent in the above writ.

The relator was a soldier during the late war; while at home upon a furlough, his wife was taken sick and died. He left his home for the army, the evening after the funeral, under a peremptory and thrice repeated order to rejoin his regiment. Before he left, however, he made arrangements to have his household goods sold for the benefit of his children, of whom he had several. The evidence indicated that the family were poor, and that prior to his wife's death, they had a struggling time—particularly during the absence of the relator in the army. His wife's relatives came to his relief when his wife died, and the children were taken care of and provided for by them. Mrs. Dougherty, a sister of his wife, took this child at the request of the relator, to keep it and bring it up as one of her own children. In the language of the witness, "he gave the child to her." Since that time Mrs. Dougherty and her husband have taken care of it, have treated it as one of their own children, and have been at the entire expense of its maintenance. The relator, after returning from the army, married a second wife, about six years ago. He has visited his said child five times in the last eight years. He has contributed nothing to its support

in all that time, and until quite recently, made no claim for its custody. He now claims to have the care and the control of this child, and has sued out this writ to compel Mr. and Mrs. Dougherty to surrender it up to him.

Such are the facts of this case briefly stated. To which, perhaps, it is proper to add that the child, a bright intelligent little girl, upon being examined in open court, stated her preference to remain with her uncle and aunt.

In the exercise of this branch of our jurisdiction there is of necessity much left to our discretion. In addition to the legal question of the right of the parties to a proceeding like this, we have the still more important consideration of the welfare of the child. We have to look to the fitness of parties claiming the custody of children, to train them up properly, as well as to their ability to maintain them. And it frequently happens that our decisions, no matter in whose favor given, inflict great pain. Ties that have been forming for years, and gathering strength daily with each year, are suddenly, and perhaps rudely severed. And, while we may deplore, we cannot always avoid such results. It is our duty to apply to the facts of each case such principles of law as reason and authority indicate as the proper rule. In this way only can we preserve anything like uniformity in our decisions and establish settled principles, by means of which the rights of parties may be ascertained. And while, to a certain extent, each case may be said to stand alone and to be controlled by its own peculiar facts, there are, nevertheless, certain principles which are of general application, and may with propriety be referred to here. They are:

First, A parent may relinquish the care, custody and control of his child, and after having done so, his right to claim it is gone, and will not be enforced by the court.

Second, Such relinquishment by a parent of a child may be either by deed or other instrument of writing; or, it may be by parol; or by abandonment; by turning it out of the house, and permitting it to go upon its own resources; and such relinquishment or abandonment may be *presumed* from the acts of the parent.

Third, Where the right of the parent is not clear, the court will regard the interests of the child, and when of sufficient age, its wishes will be consulted.

If any authorities are needed to support these positions, they may be found in *Gilkeson v. Gilkeson*, 1 Phil. R. 194; *Com. v. Addicks*, 5 Binn. 520; *Pool v. Gott and Wife*, 14 Law Rep. 269; *Holdshif v. Patterson*, 7 Watts, 549; *State v. Smith*, 6 Greenl. 462; *King v. Delaval*, 1 Wm. Blk. 410; *King v. Smith*, 2 Str. 982; *Com. v. Hammond*, 10 Pick. 274; *Com. v. Hamilton*, 6

Mass. 273; *McDowles' Case*, 8 Johns. 382; 3 Pick. 202; 15 Mass. 275; 12 Id. 278; 2 Id. 115; 5 Wend. 206.

If we apply these principles to the facts of this case, we can arrive at but one conclusion. Mr. Terry gave his little daughter to her maternal relatives. She was then almost three years of age. The father was in the army, and his wife was dead. The aunt accepted the trust, a sacred one under the circumstances, and has performed it faithfully. The father returned from the war, married again and for nearly six years thereafter, acquiesced in the arrangement, and made no demand or claim for his child. He visited it but rarely, not oftener than once a year, and has not contributed anything to its support. He has done nothing to indicate an intention of resuming the charge of the child until recently. I think his claim comes too late. His abandonment of it may be fairly presumed from his acts, aside from the positive testimony in regard to his declarations at the time he placed it in care of the aunt.

I am not unmindful of the fact that the father and the wife's family are of different religious belief—the former is a Protestant, the latter are Catholics—and my attention has been called to the act of Assembly requiring the court, in the appointment of guardians, to give the preference to those of the same religious belief as the parents of the minor. If I were appointing a guardian I would give effect to this rule, even without the authority of an act of Assembly, as it is an eminently wise and proper law. This is a land of religious freedom, and the law, whose ministers we are, does not seek to force any particular form of religious faith upon any one. But I am not now appointing a guardian. The question before me is one of abandonment. If the father has abandoned his child, he has lost all control over its religious as well as its temporal welfare, so long as those to whom he has committed it perform their duty. And in this case I think they have done so. I examined this little girl myself privately, and she says her aunt has been a mother to her, and she knows no other home. Her heart clings to those who have sheltered her, and whose tender care has watched her steps in childhood. And something is due to those who have opened their arms and their hearts to receive her when she had no other shelter. To sever the ties thus formed would be cruel; and as I am satisfied that this child is in the care of those who have and who will do their whole duty by her, I remand her to their custody, and discharge this writ.

[Legal Gazette, June 10, 1870, Vol. 2, p. 179.]

Register's Court, Philadelphia County.

In re WILL OF THOMAS WOODFALL.

Where the testimony shows merely that the testator's mind was weakened by the infirmities of age, an issue will not be granted to determine the validity of his will.

Application for an issue.

Opinion by LUDLOW, J. Delivered June 4th, 1870.

The evidence produced in this case, by the parties contesting this will, by no means satisfies us that we should order an issue to determine its validity.

This very testimony proves that the testator remembered his property, the nature and amount of debts due to him, and the objects of his bounty; it is true that his memory was somewhat affected by advanced age, but even this did not lead him to forget that at least one of his children, if he had not absolutely neglected him in his old age, had nevertheless visited him at wide intervals of time, and the testator saw fit to discriminate in favor of those whose natural affection had not entirely expired. He would not change his will even upon solicitation. Again, the witnesses for contestants had very curious notions as to what constitutes testamentary capacity. One says, he was spiritually blind; another, that he was disconnected in conversation, and as an instance says that "he would talk about what people ought to do, and then never do it himself;" another, that "what was strange in his conversation about selling his property was the enormous price he asked for it, * * * eight hundred dollars an acre," another, that he would fly from one thing to another not connected with it. G. W. Scattergood says, he would talk strangely, sometimes he would say, "he had seven and a half acres, sometimes seven and three-quarter acres, and sometimes seven and a quarter acres." Peter Castor says, that his "idea is that a man incapable of doing business is incapable of making a will."

If we adopt the ideas of some of these witnesses, we should come to the conclusion that an aged man could never make a testamentary disposition of his property, simply because the infirmities of age had diminished the strength of his physical powers, and the vigor of his understanding; the law has very wisely established a very different standard, as any one may satisfy himself who will read *Harrison v. Rowan*, 3 W. C. C. R. 580; *Stevens v. Vanderve*, 4 Id. 262; *Judge Lewis' opinion in Graybill v. Barr*, 5 Barr, 442, and especially *Leech v. Leech*, 9 H. 68, in which case Judge King, with his matured ability,

grasped the whole subject, and in his charge to the jury exhausted it; this judgment was affirmed by the Supreme Court, its principles have never been modified, it is hoped they never will be, and they rule this case. Issue refused, and probate ordered.

E. E. Petit, Esq., for contestants.

W. H. Yerkes, Esq., for will.

[*Legal Gazette*, June 10, 1870, Vol. 2, p. 179.]

Register's Court, Philadelphia County.

IN RE STAMPING LETTERS TESTAMENTARY.

The decisions of the commissioner of internal revenue upon the probate of wills have been, that stamps shall be affixed upon both the real and personal estate, whether under the control of an executor or not. The following decision was rendered June 10th, 1870, by the Register's Court of Philadelphia county upon this subject.

In the matter of the application for letters testamentary upon the last will of Rebecca M. McMurtrie, deceased:

"And now, May 31st, 1870, at a Register's Court, held this day, application is made for letters testamentary upon the last will of Rebecca M. McMurtrie, deceased, upon the executor taking the usual oath for the performance of his duties and his offering to affix United States revenue stamps upon said letters testamentary, in accordance with an affidavit of said executor setting forth 'that the estate and effects for or in respect of which the said probate and letters testamentary are applied for do not exceed the sum of five thousand dollars (\$5,000).'

"And it appearing that by the said will the executor has no interest, direct or indirect, in the real estate of the testatrix, it is ordered and decreed by the court that letters testamentary upon said will be granted to said executor upon stamps being affixed according to the value of the estate and effects passing to or under the control of the executor."

JAMES R. LUDLOW,

WM. A. LEECH,

Register of Wills.

[*Legal Gazette*, June 10, 1870, Vol. 2, p. 180.]

Orphans' Court, Philadelphia County.

PROVENCHERE'S ESTATE.

A testator bequeathed his property "upon trust as to one moiety to invest the same, &c., to pay over the income thereof to M. R. &c., and after her decease or marriage, to hold the same to the use of my grandchildren, A. L. F. and M., share and share alike, the income to be applied to their maintenance and the capital to be paid to them as they respectively attain the age of twenty-one years," &c. *Held:*

1. That the general rule is that where personal estate is limited to one for life, and after his death to another, the interest of the second legatee is vested, and that as the limitation as to time was affixed not to the gift but to the time of payment, the interest of the grandchildren was a vested and not a contingent interest.

2. The words share and share alike destroyed the joint tenancy which would otherwise have been presumed.

Sur exception to auditor's report.

Opinion by LUDLOW, J. Delivered June 4th, 1870.

The question to be decided upon the exceptions to the auditor's report in this case is this, did the grandchildren of the testator take vested or contingent interests under his will? The clause of the will, which is the subject matter of dispute, reads as follows: "Upon trust as to one moiety, to invest the same from time to time, in some productive manner, at their discretion, and pay over the income or interest thereof to my daughter-in-law, Maria Rutgers, during her widowhood, and after her decease, or marriage, to hold the same to the use of my grandchildren, Amelia, Lize, Ferdinand and Mary, share and share alike, the income to be applied to their maintenance and education, and the capital to be paid to them as they respectively attain the age of twenty-one years. In case the daughters marry in their minority, their shares to be paid at the time of marriage." From the numerous authorities cited by the learned counsel in this case, it may be safely said that in cases of this description, no estate or interest will be held to be contingent, unless decisive words of contingency are used, and it is necessary to hold the same contingent in order to carry out the other provisions or implications of the will.

It is also very clear that as a general and positive rule, if the words "payable," or "to be paid," are omitted, and the legacy is given, "at" twenty-one, or "if," "when," "in case," or "provided," the legatee attains twenty-one, or at any other future definite period, this confers on him a contingent interest which depends for its vesting and transmissibility to his executors or administrators upon his being alive at the period specified. 2 Wm. on Executors, p. 1105, and cases there cited. But this rule is subject to certain well defined exceptions; one of which is that a bequest of interest vests the principal or corpus of the estate.

A bequest of dividends is said to be an exception to the general rule, and Chief Justice Gibson so called it in *King v.*

King, 1 W. & S. 207, citing *Batsford v. Kebbel*, 3 Ves. 363; and so it is, if we regard the principle as a general one, that a bequest of interest vests the corpus of an estate, though the text writers class that doctrine among the exceptions to the fixed rule first above stated.

Another exception to the general rule is, that when personal estate is limited to one for life, and after his death to another, the interest of the second legatee is vested, *Fearne Con. Rem.* 554, *note*, though this principle is again modified, where it appears from the context of the will that no interest in the capital was intended to pass until the determination of the life estate, or some particular period. *Fearne Con. Rem.* *Ib.*

When the enjoyment is divided into successive periods, all the fragments of it vest at the same time. See *King v. King*, *supra*, and authorities there cited.

These being the general principles by which we must be guided, we have found ourselves unable to agree with the conclusion at which the auditor arrived, the cases upon which he rests his opinion, seem to fall within the general rules, and not the exceptions to them.

It is admitted that where there is no antecedent and separate gift, independent of the direction and time of payment, the legacy is contingent, but that is one of the very questions about which there must be considerable controversy in this case.

This testator severed the one-half of his estate from the other; he then does not declare that this half shall be given to his grandchildren "at," or "when," or "if," or "in case of," or "provided" they reach twenty-one or marry, but the capital is to be "paid to them as they attain the age of twenty-one"—that is, time is affixed *not to the gift*, but to the payment of it.

It is true the testator created a trust for his wife during life or widowhood, but this was simply for the convenience of the estate, and is, moreover, within, expressly, the second exception to the general rule, and the principle which declares that where the enjoyment is divided into periods, the fragments vest at the same time, and strengthens our view of the case, unless it appears that the general intention of the testator will be destroyed.

What then was the general intention? Clearly to provide for his daughter-in-law and her children, not as a class, but as individuals; hence he not only names them each, but declares they shall take "share and share alike" Now while as a general rule residuary legatees take as joint tenants, yet where words of severance are used, the general rule gives way, and it requires no authority to prove that the words "share and share alike," are just the words which destroy the joint tenancy.

It is true that even these words may be disregarded in a clear case, but this is not such an one, for it is very difficult to believe (this will having been executed prior to our act of 1833), that the testator in any contingency intended to exclude the children of either of his grandchildren, should either grandchild die in his lifetime leaving issue. Again, there is no limitation over, and while in devises of realty words of limitation must be added to give more than a life estate, in bequests of personalty the rule is that words of qualification are required to restrain the extent and duration of the estate. See *Robert's Appeal*, 9 P. F. S. 74.

Exceptions sustained, and decree according to principles above stated.

[Legal Gazette, June 17, 1870, Vol. 2, p. 190.]

Register's Court, Philadelphia County.

In re WILL OF DAVID S. KENNEDY.

The certificate of the clerk of a Surrogate's Court in New York, that the surrogate is the presiding magistrate in that court, is not necessary to be appended to an exemplification of a will from that State, in order to admit the will to record and the issuing of letters testamentary upon it, in Pennsylvania.

To WILLIAM A. LEECH, Esquire, Register of Wills for the City and County of Philadelphia.

SIR:—On the 30th of April, 1870, I offered to you for probate a copy of the will of David S. Kennedy, late of the city of New York, deceased, which will was proved in the county and State of New York, according to the laws thereof, and duly authenticated; I produced also therewith a copy of record of the proceedings for the probate of the original of said will, and of the letters testamentary issued thereon by the surrogate of said county of New York, attested by the clerk of the Surrogate's Court of said county, and with the certificate of Robert C. Hutchings, Esquire, the surrogate and the presiding magistrate of said Surrogate's Court that the exemplification of said will, probate and letters testamentary was authenticated in due form and by the proper officer and requested that letters testamentary thereon might be granted by you to me as one of the executors named in said will.

As it may be a doubtful question whether, in addition to the certificates mentioned, the clerk of the Surrogate's Court aforesaid should not also have given a certificate under the seal of the court, that the said Robert C. Hutchings was the presiding magistrate of said court.

I respectfully request that you will appoint a Register's Court

for the decision of the question, whether such additional certificate of the clerk of said Surrogate's Court is necessary, in order to the admission by you of said will to probate, and the granting of letters testamentary to me thereon.

As one of the children of testator, and a devisee under the will, I am a "person interested."

Annexed are copies of said attestation of the clerk and certificate of the presiding magistrate.

Very respectfully,

ROBERT LENOX KENNEDY,

By his Attorney, Sam'l C. Perkins.

Philadelphia, May 5, 1870.

STATE AND COUNTY OF NEW YORK,
SURROGATE'S OFFICE, ss.

I, Morgan A. Dayton, Jr., clerk to the Surrogate's Court of said county, do hereby certify, that I have compared the foregoing copy of the last will and testament of David S. Kennedy, deceased, together with the probate thereof and the letters testamentary, granted thereon, with the original record thereof, now remaining in this office, and have found the same to be a correct transcript therefrom, and of the whole of such original record.

In testimony whereof, I have hereunto set my hand and official seal of office of said surrogate, this twenty-eighth day of April, in the year of our Lord one thousand eight hundred and seventy.

[L. S.]

MORGAN A. DAYTON, JR.,
Clerk to the Surrogate's Court.

[U. S. I. R. S. 5 c.]

STATE AND COUNTY OF NEW YORK,
SURROGATE'S OFFICE, ss.

I, Robert C. Hutchings, surrogate of said county, and presiding magistrate of the Surrogate's Court, do hereby certify that the foregoing exemplification of the last will and testament of David S. Kennedy, deceased, together with the probate thereof and the letters testamentary granted thereon, is authenticated in due form, and by the proper officer.

In testimony whereof, I have hereunto set my hand and official seal of the Surrogate's Court, this twenty-eighth day of April, in the year of our Lord one thousand eight hundred and seventy.

[L. S.]

ROBERT C. HUTCHINGS,
Surrogate.

[U. S. I. R. S. 5 c.]

And now, to wit: May 17th, 1870, this case came on to be heard before the Register's Court, and was argued by counsel, whereupon, after consideration, it is ordered and adjudged and decreed, that the will of David S. Kennedy, within mentioned, be admitted to probate by the register of wills of the county of Philadelphia, upon the exemplification of the record of proceedings within mentioned, and that the said register grant letters testamentary thereon, to one or more of the executors named therein, or letters of administration, with the will annexed, as the circumstances of the case may require, in the same manner as if the original will had been proved before said register, and application made to him to commit the administration of said estate to the person or persons properly entitled thereto.

JAMES R. LUDLOW,
E. M. PAXSON,
WM. A. LEECH, Register.

[Legal Gazette, June 17, 1870, Vol. 2, p. 190.]

Register's Court, Philadelphia County.

In re ESTATE of GEO. A. ALTER, DEC'D.

A husband and wife made wills in each other's favor, but by mistake each signed the will of the other. After the death of the husband an act of Assembly was passed, giving the Register's Court the power of a court of chancery and authorizing it at the petition of the wife to reform the paper and admit it to probate on proof of the alleged mistake. On the filing of the petition authorized, *Held*:

1. That the jurisdiction of chancery would only attach after probate.
2. That it has jurisdiction only to construe or reform an instrument already made, it cannot execute one.
3. The will in this instance is a manifest absurdity, as it purports to give all the property of the wife to herself, and the real and personal estate of S. A. Alter vested on his death in his heirs-at-law and distributees under the intestate acts, and no special legislation could divest their rights: as against them it was unconstitutional.

Sur petition to reform will.

Opinion by LUDLOW, J. Delivered June 18th, 1870.

George A. Alter and Catharine his wife each determined to make a will, and each intended to give to the survivor the property he or she possessed. Two wills were prepared for execution, and as was supposed were duly executed, and then placed in separate envelopes. The husband died, and on an examination of the envelope containing, as was thought, his will, it was discovered that the husband had signed his wife's will, and the wife had signed the husband's will.

In this dilemma the wife obtained legislation, and an act of Assembly was passed authorizing her to file a petition stating the facts, and upon proof of "the alleged mistake" to the satisfaction of the Register's Court, that tribunal is clothed with

"the powers of a court of chancery," and is authorized "to reform said paper-writing," and "to have entered in the office for the Register of Wills in and for the city and county, the said paper-writing, which he (George A. Alter) intended to execute as his last will and testament, as if the said writing had been signed by him, with his own hand and seal, and not by his said wife Catharine."

The petition contemplated by the act of Assembly has been filed, notice was duly given to the heirs-at-law of the decedent, and they resist this application. It ought further to be added that the wife of George A. Alter, not only survived her husband, but is now alive: and we have no doubt, as a matter of fact, that a clear mistake was made in the execution of these papers.

We will be best able to perform our duty if we first determine what, exactly, we are asked to do in this case. Clearly, we are, in general terms, to reform a last will and testament; but which will is to be reformed? Undoubtedly the will which has been executed by the wife in due form of law, and which is upon its face a testamentary disposition of property, by a woman who is now alive, and whose will is therefore ambulatory until her death. Nor is this all. We must go further, and by virtue of a legislative edict strike out, in fact and in law, the name of the wife, and thus execute a will for a dead man.

Such legislation as this, was, we think, never before heard of, and if it can stand the test of judicial criticism will work a revolution in our law.

For the following reasons we think the act is fatally defective: —

1. If a court of chancery ever had jurisdiction in matters of probate, that power is now considered to be obsolete. Spencer's Eq. Juris., ch. vi., p. 701; Adams' Eq., ch. iv., p. 248-9; Id. 178. Nor can jurisdiction attach until after probate. *Allen v. McRierson*, 1 Hs. Lds. Ca., 191; Story's Eq. Juris., sec. 140; see also Id., ch. xxxix., sec. 1445-7.

And a court of equity cannot in any event dispense with the regulations prescribed by the Legislature as it regards formalities necessary in the execution of wills. (1 Fremm. Ch. 130.) Adams in his work, commenting upon this point, declares that "a will cannot be corrected by evidence of mistake so as to supply a clause or word inadvertently omitted by the drawer or copier, for there can be no will without the statutory forms." And this principle is correctly stated if we regard it as applying to the formalities required by statute. Story, in his work upon equity, remarks:—"It will be found, we think, upon examination, that American courts of equity have not interfered to correct alleged mistakes in the execution of wills, either

as to statutory requisites or the manner of writing, as by inserting the name of another legatee," and adds, "The extent to which the English equity courts have sometimes carried this branch of their remedial powers, has more the appearance of making wills as they (testators) probably would do if now alive, than carrying them into effect as they were in fact made. 1 Story Eq., sec. 180. (a) It is well settled that Chancery never relieves against a statute. Comyn's Dig., tit. Chancery, 3 F. 6, 7, 8; Sedgwick's Stat. and Const. Law, 104.

In the further investigation of the subject it is to be remarked, that among the host of cases cited by counsel for the wife, not one of them is at all like this cause, and for the reason, that while deeds, contracts, and wills have been reformed, the effort has invariably been made to find out an intention in an instrument having a legal existence, and not to execute a paper. Hence it has been wisely said, "In the construction of wills indulgence has been shown to the ignorance, unskilfulness, and even negligence of testators, and no degree of technical informality, or of grammatical, or orthographical error will deter the court from giving effect to an intention;" but it is to be observed that in every case which has come to our knowledge a will, duly executed, has been before a court of law or of equity. A diligent search has failed to produce a single instance in which a court of law or of equity has ever executed a will, while in a case reported in 14 Jurist, 402, the Prerogative Court in England refused probate in a cause precisely similar to this one, except that the parties executing the supposed wills were sisters, and not husband and wife. It is thus reported:—

"Harding applied for probate of the will of the deceased to be granted, the signatures of the two wills being respectively restored to their original state, on a suggestion that a court of equity might put a construction on the contents of the one now before the court.

"Sir H. Jenner Fust—Two ladies lived together, and they determined to make what I may call mutual wills. The wills are the same *mutatis mutandis*; they were drawn up and executed, that is if executed they are, at one and the same time, but unfortunately each signed the other's will. After the death of one of them the solicitor alters them, so as to make one of them appear as that of the other, and I need scarcely say that he has erred in so doing. But what is to be done with this paper? It is not the will of the deceased, and it purports to give all her property to herself—a manifest absurdity. I must reject the motion."

If we are not much mistaken, it was a vain thing to endeavor to clothe the Register's Court, in this case, with chancery

powers, for it is evident that courts of chancery have no such jurisdiction as is now contended for.

2. It has, however, been argued, that legislation in this instance cured all defects, for we may consider, under the act, evidence of intention, in a case in which there is no latent ambiguity; and, secondly, this act of Assembly has repealed in effect and for the purposes of this case our statute of wills.

It is too clear for argument that, in the present condition of our law, the evidence produced in this case would have been rejected but for this statute, because, as we have before said, there is here no latent ambiguity; and, possibly, legislative authority might have been all powerful but for article nine in our bill of rights, which declares, among other things, that no man can be "deprived of his life, liberty, or property, unless by the judgment of his peers, or the law of the land," and this article presents to this petitioner an insurmountable barrier. In *Norman v. Heish*, 5 W. & S. 173, when the attempt was made to give an inheritable source, as well as descendible quality, to the blood of one Christopher Norman, which it did not possess while he lived, the chief justice, commenting on the section of the declaration of rights above quoted, says with a power the force of which can now be appreciated. "What law? undoubtedly a pre-existent rule of conduct declarative of a penalty for a prohibited act; not an *ex post facto* rescript or decree made for the occasion.

"The design of the convention was to exclude arbitrary power from every branch of the government, and there would be no exclusion of it if such rescripts or decrees were allowed to take effect in the form of a statute. The right of property has no foundation or security but the law, and when the Legislature shall successfully attempt to overturn it, even in a single instance, the liberty of the citizen will be no more."

What proposition can be clearer, than that at the moment the breath went out of the body of George A. Alter, his estate, real and personal, vested, in full property, in his heirs-at-law and distributees under the intestate law of Pennsylvania? It is true, he may have intended to execute a will, but he did not in fact so do; he signed a paper, but not his will; and the case is not harder than that of a person who, in disregard of our statute of wills, signs his name at the top in place of the end thereof, or who adds a codicil and does not execute it, or who dies while his professional adviser in preparing his will.

This is a hard case, but the injury which would be inflicted upon society by giving effect to this act would be infinitely greater than any evil which will flow from a disregard of it. And the time has not yet arrived when by any process of legal ingenuity, aided by legislative action, the property of one man

can be arbitrarily given to another by any "rescript or decree," as Chief Justice Gibson calls it, such as is presented to our notice in this case.

Without power at law or in equity to aid this petitioner, and with a constitutional provision staring us in the face, we must decline to grant the prayer of this petition.

Petition dismissed.

(Affirmed by the Supreme Court, in *Alter's Estate*, 3 *Legal Gazette*, 53.)

Prior to the passage of the act of Assembly, the paper had been offered for probate, before William A. Leech, Register of Wills, and rejected, because not legally executed.—EDITOR.

[*Legal Gazette*, June 24, 1870, Vol. 2, p. 196.]

Court of Common Pleas, Philadelphia County.

IN EQUITY.

STEINBAKER v. WILSON & YOUNG.

1. A judgment note given by a third person in relief of one arrested on a charge of obtaining money under false pretences, to obtain his discharge, after the contents have been fully explained to him, and the intention to assign it to the prosecutor who would enforce its collection at maturity has been made known to him, is valid, and a chancellor will not forbid its collection by execution.
2. It is competent for a prosecutor in a case of false pretences to compound the offence, it being a misdemeanor.

Opinion by PAXSON, J. Delivered June 4th, 1870.

This case comes before us upon bill, answer and proofs, and is an application to restrain proceedings at law. The defendants have issued an execution against the plaintiff in the District Court, No. 7, of July Term, 1868, upon a judgment entered in said court by confession, and under which said execution the personal property of the plaintiff in this proceeding has been levied upon.

The plaintiff avers that he is unable to read or write, and signs his name by a mere mechanical effort. That Hugh Wilson, one of the defendants herein, was arrested upon a charge of obtaining money by means of false pretences, upon a warrant issued on the 21st day of December, 1867, by the recorder of the City of Philadelphia, on the oath of William Young, one of the defendants in this bill. That the said plaintiff, at the request of the said Hugh Wilson, became bail for the latter for his appearance before the recorder, and that subsequently, to wit: December 27th, 1867, he signed another paper, which Wilson said was necessary to perfect the proceedings before the recorder; and that he subsequently ascertained that the said paper of December 27th, was a judgment note for the sum of \$1,500, with power to enter judgment thereon, with a waiver of exemption. That subsequently, to wit, on the 10th day of

January, 1868, the plaintiff signed another paper, under the impression it was necessary to further perfect the said proceedings before the alderman, but which he afterwards ascertained was a certificate that he (the said plaintiff) had no set-off to the said judgment note. That neither of the said papers was read over to the said plaintiff, and that he supposed they had reference only to the appearance of the said Wilson before the recorder to answer the said charge. The bill further avers that the said Hugh Wilson delivered the said note to the said William Young, to secure an antecedent indebtedness, either his own, or that of a third person. The prayer of the bill is for an injunction to restrain the plaintiff from further proceeding upon his *fi. fa.*, and that he may be decreed to enter satisfaction upon said judgment.

The defendants have each filed an answer to the said bill. The defendant Young, alleges substantially, that he placed \$1,350 in Wilson's hands to invest upon a judgment against one John Horning, for \$1,500. That he subsequently ascertained the Horning judgment to be a fraud—there being no such person. Whereupon he had Wilson arrested for obtaining money by false pretences, and that the plaintiff, Steinbaker, became bail for his appearance. That subsequently an arrangement was made to settle the case before the alderman, upon Wilson's giving security for the money, and that in pursuance of this arrangement, the plaintiff, Steinbaker, executed this judgment note in favor of Wilson, which note was afterwards transferred to Mr. Young. That the plaintiff was fully advised of the character of the note, and the purpose to which it was to be applied.

The evidence in this case clearly shows that if plaintiff did not understand the transaction at the time he signed the note, and the certificate that he had no set-off, he might and ought to have known it. There was no fraud practised upon him. On the contrary, there seems to have been an effort on the part of Mr. Young, or his counsel, to deter Mr. Steinbaker from signing the papers. Wm. G. McCaully, a witness to the transaction, says: "Seeing that the security offered could not be objected to, I proceeded to order searches, expecting to find claims in the way, which would be my excuse for objecting to Steinbaker's note. * * * They showed three judgments in the Common Pleas; one of \$34, one of \$63.57, and a nonsuit. * * * I sent the searches to Mr. Wilson, and they were returned to me in a few days marked satisfied. Mr Wilson informed me that Mr. Steinbaker had paid the claims, the searches being clear. * * * I then made an appointment with Mr. Wilson to bring Mr. Steinbaker. In the meantime, I consulted with Mr. Black as to the proper method of deterring Mr. Steinbaker from giv-

ing his note; we concluded that we would make an appointment with Mr. Steinbaker, and at the time of meeting explain to Mr. Steinbaker that proceedings would be commenced on his note, as soon as it should fall due, to recover fifteen hundred dollars with interest from the date of it. This we supposed would deter him. The meeting took place, and Mr. Black and myself both explained to Mr. Steinbaker, in presence of Mr. Wilson, that he would be called on for the money at the expiration of the time for payment. We explained to him that the note was to be assigned to William Young. I asked him if he knew the nature of the note; he waved me off with his hand, and said: *I know all about notes, I have given enough of them.* Mr. Black and I consulted together, and concluded to draw a formidable declaration of no set-off, intending to read it distinctly to him, as a last effort to deter him; the paper was prepared by Mr. Black; it is marked Exhibit 'D'; it was read to him distinctly and aloud; he says that is all right, I will sign that; and both he and Mr. Wilson signed it in my presence."

Surely a man who signs a judgment note under such circumstance, has no ground upon which to rest an allegation that he was imposed upon. Searches were taken out, encumbrances paid off against his property, in order to make the judgment a first lien, and he was expressly warned that he would be called upon to pay the money upon the maturity of the note. He was also told that the note was to be assigned to Young; and it was therefore equivalent to giving the note directly to Young.

The only other ground upon which the note was assailed, was want of consideration. That there was no consideration moving between Young and Steinbaker, and that the former took the note subject to the equities between Wilson and the latter.

There is nothing in the law to prevent the prosecutor in a case of false pretences, from compounding the offence, and abandoning the prosecution. If the defendant will make restitution, there is no legal objection to its reception by the prosecutor, the offence being a mere misdemeanor. If the defendant may make restitution, he may do so by paying the cash, or he may give his note or other obligation therefor, if the prosecutor is willing to accept it. And if he may give his note he may give security therefor, and if the surety understand the nature of the transaction, he will be bound. In this case, we think the evidence establishes the fact beyond any reasonable doubt, that the plaintiff understood he was giving this note to help Wilson out of his difficulty. He knew it was to be handed over immediately to Young. And he knew all about the difficulty between Wilson and Young. Besides, if he did not know, he ought to have known. He had every opportunity to learn the truth, and

if he permitted his name to be used for the purpose of effecting this settlement, and thereby induced Young to give up the hold he had upon Wilson by means of the criminal law, he is estopped from setting up a defence to it of this nature. If any fraud had been practised upon him, he would have been entitled to relief; but if a man will shut his eyes so that he will not see, and close his ears so that he will not hear, and has permitted other parties to change their relations by reason of his conduct, he has no claim upon the sound discretion of a chancellor; and upon him must rest the consequences of his own act, although subsequent reflection may have led him to the conclusion that it was an act of folly.

Bill dismissed.

*Chapman Freeman and David W. Sellers, Esqs., for plaintiff.
Maurice Black, Esq., for defendant.*

[Legal Gazette, July 1, 1870, Vol. 2, p. 204.]

Court of Common Pleas, Philadelphia County.

IN EQUITY.

REECE v. HENDRICKS.

A bond between the vendor and the vendee and his assigns of a milk route, with condition that the former will not sell milk on the route, will be enforced in equity in favor of the assigns of the latter, although there is a penalty contained in it for its breach.

Opinion by PAXSON, J. Delivered June 18th, 1870.

This is a motion to dissolve a special injunction granted under the five-day rule. Prior to the seventeenth day of May, A. D. 1869, the defendant had what is known as a milk route in Germantown, and having acquired a good run of custom and good-will on said milk route, on the day above mentioned, sold out his said milk route for the sum of six hundred dollars to one of the complainants, David T. Reece, and executed an agreement under his hand and seal, covenanting *inter alia* with the said Reece that "he, the said Garret Hendricks, or any of his family, should not at any time thereafter, furnish milk on said route in Germantown;" and for the true performance thereof, the said defendant, Garrett Hendricks, bound himself unto the said Reece, his executors, administrators and assigns in the penal sum of six hundred dollars.

The said Reece served milk on said route for some time in pursuance of said agreement, and on the 12th of April, 1870, for the consideration of six hundred dollars, sold and assigned the same to the complainant, John Cannon, who thereafter proceeded to furnish milk to the persons requiring it upon said route, and is still engaged therein. The said defendant, since

his sale of the said route to Reece, has continued and still does furnish milk along the line of said route, the boundaries whereof are specified in said bill, in violation of his said agreement.

This is a most palpable breach of faith. The defendant sold the good-will of his milk route and received the proceeds thereof, and with the consideration money in his pocket, seeks to deprive his vendee of the benefit of his purchase by attempting to get back his old customers in direct violation of his agreement. He contends that equity will not enforce specific performance of said agreement, because,

First. It is in restraint of trade and therefore void.

Second. It cannot be enforced by complainant because he is the assignee of Reece, and

Third. The agreement contains a penalty for its non-performance and that, therefore, there is a full and complete remedy at law.

There would have been force in the first objection, if there had been a covenant not to carry on the business or serve milk anywhere. But covenants restraining the exercise of trade in a particular place, and not covenants in general restraint of trade have been repeatedly sustained. *Harrison v. Goodman*, 2 Madd. Ch. Rep. 198; *Williams v. Williams*, 2 Swanst. R. 253; *Palmer v. Haines*, 1 Parsons, 476.

Nor does the fact that Cannon is the assignee of Reece help the defendant. He has covenanted with Reece *and his assigns*. Why should not Reece, who has paid value for this thing, transfer it for value to his successor? Who is injured thereby? not the defendant certainly, who has sold out and been paid for all his interest in the route. This court recently decided in the case of the *Joseph Dixon Crucible Co. v. Guggenheim*, reported in the Legal Gazette of April 8th, 1870, that the right to a trademark would pass by assignment. This partakes somewhat of the same nature. It is the good will, the credit, reputation and confidence acquired by attention to business, and for the encouragement of industry and fair dealing, should be protected by the courts to a proper extent.

The plaintiff may have his remedy at law for the breach of the agreement, but it is not an adequate remedy. Nothing but a decree in equity can do complete and perfect justice in such a case as this. The insertion of a penalty in the covenant does not affect the complainant's right to equitable relief. The damages would still have to be proved, and they are of such a character as to be difficult of adjustment. Had the agreement provided for liquidated damages instead of a penalty, the result might have been different.

The motion to dissolve the injunction is refused.

[Legal Gazette, July 1, 1870, Vol. 2, p. 204.]

Supreme Court of Pennsylvania.

AT NISI PRIUS.

FOX v. WATTS et al.

1. After a judgment in the Supreme Court (reported in 14 P. F. Smith, 336) awarding possession of certain premises, then in possession of the plaintiff holding over after the expiration of a lease from the defendants' testator, to the defendants, an injunction will not be issued to restrain them from executing an *habere facias possessionem*, although, in the merits, the tenant may perhaps have been harshly treated by the executors.
2. Where such a lessee in possession has made an offer for a renewal of his lease, which is approved by some of the residuary legatees but declined by the executor of the estate, a different question would arise upon a bill filed by a legatee.

Opinion by READ, J. Delivered July 5th, 1870.

Robert Fox leased from Isaac Brown Parker, the premises on the north side of Walnut street above Eighth street, then known as the "Continental Theatre," and since known as Fox's American Theatre," for a period of four years, at a rental of three thousand dollars, besides the payment of all taxes, water rents and all other charges on the premises, which are now estimated at one thousand dollars per annum.

The lease was executed on the 27th February, 1864, but the term did not commence until the 1st April, 1865, the premises being in the possession of tenants whose terms did not expire until that day. On the 19th September, 1865, Mr. Parker died, having made his will on the 18th August preceding, of which he appointed the defendants executors, and made his seven children his residuary devisees and legatees.

On the 17th June, 1867, the theatre was destroyed by fire, and rebuilt by the plaintiff in a month, at a cost to him of nearly \$25,000, besides the entire cessation of business during that period. To this sum the executors contributed nothing, although by the provisions of the lease, in case of "unavoidable casualties," of which fire is one, the lessee was not bound to rebuild.

Whatever may have passed between the parties, there being only a little over twenty months of the lease left, after this heavy loss and expenditure, the lessee, who by his talent and energy had created a prosperous business, was entitled to every kind consideration at the hands of the executors.

They notified him on the 31st day of March, 1869, the very day the lease ended, of their desire to repossess the premises. Proceedings were instituted under the landlord and tenant act of 1772, and were on the 5th May, 1870, terminated by the Supreme Court decreeing restitution of the premises.

During this period there were negotiations between the parties, Mr. Fox desiring to purchase or lease the theatre, and from what passed on the argument, I infer that some of his offers were approved by some of the residuary devisees.

Mr. Hanson says Mr. Fitler, a conveyancer of this city, had made, on behalf of Mr. Fox, offers to the executors to purchase the American Theatre. These had been declined. "On or about the 9th May, 1870, Mr. Fitler made, on behalf of Mr. Fox, an offer to lease the theatre, under conditions particularly mentioned by him."

Of this offer some of the residuary devisees and legatees would seem to have approved, for on the 11th May, Mr. Willson, counsel for Mrs. Freeman, gave written notice "that his client was informed of the offer to lease, made by Mr. Fox, and that in case of any loss of income from a refusal to accept the offer, she would expect to hold the executors responsible for her share."

At this time the note of the 9th had been delivered to Mr. Fox. The reply of Mr. Hanson was, "that of the large amount due to the executors, Mr. Fox had not paid a penny, and that the executors believed such payment should have preceded any negotiation for a renewal of the tenancy, and that it would have been the very best evidence of *good faith*, that could have been offered by a tenant who had purposely and inexcusably violated his covenant of lease."

And Mr. Fitler says, "I was met with an answer from Mr. Dougherty, that no further negotiation could be proceeded with unless the back rent was paid."

On the 12th, under these broad intimations, Mr. Fitler says, "Mr. Fox stated, that one year's rent was due on the 1st April, 1870; that the water rent and taxes for 1869 had been paid by him. He gave me the \$3,000 for the purpose of paying the rent." "The receipt was given to me," says Mr. Fitler, "by Mr. Hanson, another of the attorneys for the Parker estate, specifying particularly that said \$3,000 was for rent."

This receipt is not produced, but Mr. Hanson states its substance as follows: "I then gave Mr. Fitler a receipt for the \$3,000, inadvertently expressing that it was for the rent of the American Theatre from the 1st April, 1869, to the 1st April, 1870, exclusive of taxes, water rent, gas bills, license fees, and the other charges required by the lease from L. B. Parker, deceased, to be paid by R. Fox."

Mr. Hanson being dissatisfied with the phraseology of his receipt, drafted another. "I called," says Mr. Hanson, "at the theatre a few minutes after 12 m., and saw Mr. Fox. I explained to him that I must have the receipt which he held, and offered to exchange it for the one now an exhibit to the bill of complaint as aforesaid. Mr. Fox seemed not to understand why I wanted the exchange."

The receipts were exchanged, and the receipt, a copy of which is annexed to the bill, does not seem to vary in substance from

the first receipt given to Mr. Fitler. The only change is from "rent" to "use and occupation." Rent arises from contract, and so does use and occupation. Use and occupation is necessarily with the permission of the owner, and in an action for use and occupation, the English common law procedure act gives the following form of declaration: "The defendant's use by the plaintiff's permission of messuages and lands of the plaintiff."

As to what took place between Mr. Hanson and Mr. Fox at their interview on the 12th May, there is a very important difference of recollection between the parties. Mr. Fox says, "at the time Mr. Hanson, one of the counsel for the executors, asked for the receipt for \$3,000 rent and substituted the one for it which is attached to the bill, he told me that he wanted to make it (the receipt) in a different form, and then handed me the new one, which he said would answer the same purpose, as it would enable me to continue as a tenant for six months any how, to which I replied that it mattered not how the receipt was written, if I could retain the premises. I then went on and made contracts for the coming season."

William L. Gilmore says, "I am the business agent of Robert Fox, the proprietor of the American Theatre. I was present when Mr. Hanson asked Mr. Fox for the receipt for the \$3,000 rent and substituted the one for it which is attached to the bill. When Mr. Hanson asked for the old receipt, he told Mr. Fox that he wanted to make it in a different form, and then handed him the new one, which he said would answer Mr. Fox's purpose just as well as the other, as it would enable him to continue as tenant for six months any how. Mr. Fox replied that he didn't care how the receipt was written, so that he was allowed to retain possession. Immediately after the conclusion of this transaction Mr. Fox told me to go ahead and make contracts with artists for six months. We have, since the payment of the \$3,000, re-engaged all our present employees consisting of one hundred and twenty-five persons, including band and mechanics, and have made all the necessary repairs for the present season."

The judgment of the Supreme Court on the 5th May, 1870, if carried out, gave the executors nothing but possession of the premises. It left the compensation for their use by Mr. Fox from 1st April, 1869, for future adjustment and litigation. Negotiations for purchase and lease were going on, and an offer to lease was made by Mr. Fox upon terms approved by some of the *cestui que trusts*. Upon the part of the executors a suggestion was made, whilst an offer to lease the theatre by Mr. Fox was pending and under consideration, that the payment of the money due by him should have preceded any negotiation for a

renewal of the tenancy. The natural construction put upon this suggestion to pay back rent, would be that the offer made would then be favorably considered, or at the least was entertained by the executors. I feel that the counsel proposing it, must have had some such idea, for it never could have been his intention merely to collect an outstanding debt.

Four days after the payment of the \$3,000 an *habere facias possessionem* was issued.

The executor, in his affidavit, uses this strong language: "My desire was, from the time the judgment against him was affirmed, to get rid of him as speedily as possible, and to obtain the possession of the premises which had been so long improperly withheld from me. I never intended by anything that was said or done by me, to waive my right of instant possession of the premises, or to extend the tenancy."

If this means that he never intended to lease the theatre to the plaintiff, and that he was determined to have instant possession at all events—then this trustee has placed his counsel in an entirely false position.

The plaintiff, on rebuilding the theatre, certainly entitled himself to kind treatment. The testimony of Mr. Fox and Mr. Gilmore shows clearly, that they believed Mr. Fox was to retain possession of the theatre, and that all the contracts with artists were made under that belief. The effect of turning the plaintiff out of possession, is to deprive over a hundred persons of employment, nearly all engaged in a profession in which there are few employers, and those scattered over the Union. It is a great hardship, which should not be unnecessarily inflicted upon innocent individuals.

The plaintiff has met the defendant with what must be regarded as a fair offer, as it has been approved by three of the residuary legatees, and by other persons in the cause. With some amendments, I think it ought to be accepted.

All arrears for use and occupation from 1st April, 1870, to 1st June, 1870, to be paid at the old rate—rent to be paid from 1st June, 1870, to 1st September, 1870, at the rate of \$8,000 per annum. To pay the proportion from 1st January, 1870, to 1st September, 1870, of all taxes, charges, &c., enumerated in the lease. To pay the insurances on the building to 1st September, 1870. The arrears and rent to be paid in advance. The plaintiff to enter into an amicable action of ejectment, with confession of judgment to be entered against him on the 1st September, 1870, without stay or writ of error.

Having thus frankly stated my opinion and advice, I do not feel that upon the present bill I could continue the injunction, but a very different question might be presented upon a bill filed by residuary legatees.

Injunction dissolved.

C. H. T. Collis and John P. O'Neill, Esqs., for plaintiff.

Hunn Hanson, Daniel Dougherty, Wm. H. Rawle and Geo. W. Biddle, Esqs., for defendants.

Robert N. Willson, Wm. L. Hirst and Henry M. Phillips, Esqs., for legatees.

[Legal Gazette, July 8, 1870, Vol. 2, p. 209.]

Register of Wills, Philadelphia County.

In.re WILL OF HANNAH FLORANCE.

Opinion delivered October 4th, 1870.

In the matter of the alleged will of Hannah Florance, deceased.

Two papers have been produced before me, one of them a formal will, bearing date the seventh day of July, 1869, duly signed, sealed, published and declared as and for the last will and testament of Mrs. Hannah Florance. If this stood alone there would be no difficulty; but another paper has also been produced which proposes upon its face to distribute certain articles of personal property amongst a number of parties who are therein named. This paper appears upon its face to have been written at three different periods of time. The first part is dated April 25th, 1868, but is not signed at the end thereof, as required by the act of Assembly, and was undoubtedly set aside by the will subsequently made, unless republished subsequent to the date of the will. The second part, which bears date May 16th, 1870, is not signed or sealed by the testatrix, unless the signature to the third part was intended by the testatrix as an acknowledgment of the second part, which is dated but not signed. The third and last part is signed and witnessed, but is not dated. The subscribing witnesses testify that it was executed about three months before the decease of Mrs. Florance. It was not signed by her in their presence, but they were called in merely to attest her signature. She did not state what the paper was, only acknowledging her signature to it. Nothing was said by her at the time about the paper being her will, or as a codicil or a testamentary paper. Unless, therefore, there is something within the four corners of this paper which evidences the intention of the testatrix to substitute this paper for the formal will before recited, or to supplement that will with this as a codicil, it is my clear duty to refuse to admit this paper to probate. A careful examination of it leads me to the conclusion that it is a mere memorandum, which may or may not have moral effect with those who are the heirs at law and residuary legatees, but cannot, in my judgment, be given

legal effect, by declaring it either to be a will or a codicil, under the laws of this commonwealth.

I, therefore, as register, decline to admit said paper to probate, and direct letters testamentary to issue to the persons named in the will of July 7th, 1869.

J. ALEXANDER SIMPSON, *Register*.

[Legal Gazette, October 7, 1870, Vol. 2, p. 316.]

Court of Common Pleas, Philadelphia County.

IN EQUITY.

SMITH et al. v. MOYER et al.

Where an alderman has given judgment against a defendant and his wife, and no appeal is entered, the collection of the judgment from the wife's real estate will not be restrained for any ground of defence to the judgment or laches in taking an appeal; if sufficient, these matters should be presented to the common law side of the court.

Opinion by PAXSON, J. Delivered November 19th, 1870.

Sur motion to continue special injunction.

In this case the usual *ex parte* injunction has been issued, to restrain the defendant and Peter Lyle, high sheriff, from proceeding to sell at sheriff's sale certain real estate, alleged to be the separate estate of one of the plaintiffs, who is a married woman, and which estate is now held in trust for her by Chas. Gibbons, Esq., who is joined as a plaintiff in this bill. The bill sets forth the recovery of a judgment against Horace W. Smith and Rebecca M. Smith, his wife, before Alderman Thompson, in the sum of \$74 and costs—the filing of a transcript in this court, the issuing of an execution thereon, and a levy upon the real estate above referred to. The plaintiff, Rebecca M. Smith, alleges, in her said bill, “that the debt for which said judgment was obtained was not incurred by her for articles necessary, nor for necessary and proper repairs upon the said premises, nor was it contracted by her, or in her name by any person authorized to do so, for any other purpose.” A most excellent defence, certainly, if only made at the proper time. But these plaintiffs have had their day in court. If aggrieved by the judgment of the alderman, they could have taken their appeal to the Common Pleas, and the merits of their defence would have been passed upon by a jury. Why they did not do so, is not averred in this bill. It is true the wife, in her affidavit, says that “she caused the usual security to be entered into before the said alderman preparatory to taking an appeal, and believed that the said appeal had been entered in the Court of Common Pleas by Horace W. Smith, her husband, within the time

limited by law." The husband says nothing about any attempt or intention of entering an appeal. The bill itself must charge all the facts necessary to raise the plaintiff's equity, and a defect in this particular cannot be cured by the affidavit. If the failure to enter this appeal was the neglect of the wife, she is without remedy. If prevented by the act of her husband, or from any other cause amounting to a legal excuse, her proper course was to apply in the common law side of the court for a rule to show cause why she should not be allowed to file her appeal *nunc pro tunc*. With every disposition to relieve the plaintiff from her dilemma, we do not think it a case to warrant the interference of a court of equity. We cannot extend our chancery powers to cover every case of laches of parties to a suit at law. It has been well observed that "equity has its law as well as law its equity." We must leave the plaintiffs to their remedy at law, if they have any.

Motion denied, and the injunction dissolved.

[Legal Gazette, Nov. 29, 1870, Vol. 2, p. 372.]

Court of Quarter Sessions, Philadelphia County.

COMMONWEALTH ex rel. v. BAILEY.

1. Where the husband had his domicile in the State of Delaware, deserted his wife in the State of Massachusetts, and was arrested on the charge of desertion in the City of Philadelphia. *Held*, that the court had no jurisdiction.
2. Under the act of 1836, the proceeding is at the instance of the guardians of the poor of the county where the wife has a settlement, and upon which she becomes or is likely to become chargeable by reason of the neglect of her husband to support her. Under the act of 1867, the jurisdiction is founded upon the act of desertion, and is given to the courts of that county where it takes place.
3. The law conclusively presumes the domicile of the husband to be that of the wife, and therefore, as the domicile of the parties here was in Delaware, the court have no jurisdiction under act of 1836, as the act of desertion was committed in Massachusetts, they have no jurisdiction under that of 1867.

Opinion by PAXSON, J. Delivered December 7th, 1870.

This case, after a partial hearing upon the facts, has been argued upon the question of jurisdiction. The defendant is charged with desertion by his wife. The facts, so far as they bear upon the question now under consideration, may be stated as follows: The defendant is a surgeon in the army, and was married to the complainant in 1865. The final separation took place in January, A. D. 1869. Defendant at that time was stationed at Fort Warren, Massachusetts; his wife was staying at Auburndale, in the same State. In the latter part of January, 1869, for reasons which, for the purposes of this decision, it is not necessary to refer, the defendant sent her \$100 by a servant; with instructions to go to her mother's house, in Philadelphia, and that he would no longer live with her. They have not

lived together since. Subsequent to this separation the complainant passed most of her time in Washington, New York, and Long Branch—only a small portion of it having been passed in this city. The domicile of the defendant is in Wilmington, Delaware. It has been so for the last twelve or thirteen years. His father resides there, and his children have their home there. At one time he had a house in Wilmington. He now has a home there in connection with his father. He owns a burial lot in Wilmington, and has paid taxes and voted there. When absent from duty in the army, he returns to Wilmington as his home. He so states in his examination, and to the same effect is the testimony of his father, and another witness, a member of the bar at Wilmington, who knows him well. There was no evidence to contradict these facts, and it is not pretended that the defendant was ever domiciled in Pennsylvania. The defendant left his home in Wilmington, on the 29th of August last, on the way to Arizona, under orders from the war department. He was arrested at the Continental Hotel, in this city, on the evening of the same day, upon a warrant issued by alderman Smith, upon the oath of his wife, in which he was charged with a "desertion of his wife—complaint on behalf of the guardians of the poor." The proceeding is in the name of the "City of Philadelphia." In the recognizance taken by the alderman, the defendant is described as residing at Wilmington, Delaware.

For the defendant it was argued:

1st. That the proceedings being in the name of the guardians of the poor, were under the act of 1836, and not under that of 1867.

2d. That the domicile of the defendant was in Wilmington, Delaware.

3d. That the domicile of the husband is the domicile of the wife, and

4th. That the desertion took place in Massachusetts.

For the complainant it was argued:

1st. That the wife has her domicile in this city, and

2d. Even if this were not so, the defendant having sent her to her mother's house here, is estopped from denying it.

3d. That the proceedings may be treated as under either of the acts of Assembly, and

4th. That under the act of 1867 the question of domicile is not material, as by the terms of said act it is sufficient to sustain the jurisdiction that the parties were here at the time, and that while here a desertion took place.

In regard to the form of proceeding, it would seem clearly to come within the act of 1836. By the transcript it appears that although the oath was made by Mrs. Bailey, the complaint was on behalf of the guardians of the poor, and the suit is in

the name of the city. On Saturday last, however, a complaint was made under the act of 1867, and a warrant was lodged with the court against the defendant during the argument. Under our view of the case it is not necessary to consider how far this warrant ought to be considered a detainer. I will decide the case as originally presented, and will also express my views of it under the act of 1867.

Without consuming time in citing the numerous authorities collected with great industry and care by the learned counsel for the defendant, it is sufficient to say that unless the complainant had a domicile here at the time of the complaint in August last, the guardians of the poor were not chargeable for her support, and were not therefore entitled to proceed against her husband. I see no principle upon which her domicile here can be sustained. It is well-settled law that the domicile of the husband draws to it the domicile of the wife. The complainant's mother resided at Philadelphia at the time of the marriage of the former, and does so still, but the complainant herself resided in Wilmington for eighteen months prior to her marriage. But conceding she had a settlement in this city at the time of her marriage, she exchanged it by her marriage for that of her husband. In *Buffalo v. Whiteacre*, 3 Ill. 182, it was held that "a *feme sole*, who has a settlement, exchanges it at her marriage for the settlement of her husband, if he has one. If he has not, her maiden settlement remains until she acquires another." There can hardly be a serious question in regard to the defendant's settlement at the time of the marriage. He was, and had been for years, domiciled in another State. He was a citizen and a taxpayer in that State. He rented a house there for himself and wife, and his domicile became the domicile of his wife. Nor can the fact that the defendant in January, 1869, sent complainant to her mother's house in this city alter the fact of domicile. The law fixes the domicile. As was observed by Lord Brougham in a case decided in the House of Lords in 1855 (*Warrender v. Warrender*, 2d Clark and E. App. Cases, 488). "It is admitted on all hands that, in ordinary cases, the husband's domicile is the wife's also; that consequently had Lady Warrender been either residing really and in fact with her husband, or been accidentally absent for any length of time, or even been, by some family arrangement, in the habit of never going to Scotland, which was not her native country, while he lived generally there, no question could have been raised upon the competency of the action as excluded by her non-residence. For actual residence—residence, in point of fact, signifies nothing in case of a married woman, and shall not, in ordinary circumstances, be set up against the presumption of law that she resides with her husband. Had

she been absent for her health, or in attendance upon a sick relation, or for economical reasons, how long soever this separation *de facto* might have lasted, her domicile could never have been changed. Nay, had the parties lived in different places from a mutual understanding which prevailed between them, the case would still be the same. The law could take no notice of the fact, but must proceed upon its own conclusive presumption, and hold her domiciled where she ought to be, and where, in all ordinary circumstances, she should be—with her husband. Does the execution of a formal instrument recognizing such an understanding make any difference in the case? No."

Section 10 of act of June 13th, 1836, provides that "Every married woman shall be deemed during coverture, and after her husband's death, to be settled in the place where he was last settled, but if he shall have no known settlement, then she shall be deemed, whether he be living or dead, to be settled in the place where she was last settled before marriage."

It has been held that she will not even lose her husband's settlement by a divorce. 3 H. 182. The complainant, if she had a settlement here, as before stated, exchanged it for that of her husband upon her marriage. She has done no act since to give her a settlement in this city, and she is not chargeable upon the guardians of the poor. Settlement can only be gained in the manner pointed out by the law. A man cannot charge the guardians of the poor with the support of his wife by merely sending her within our jurisdiction.

The conclusion to which I have arrived is, that at the time of the alleged desertion and complaint the parties to this proceeding were both domiciled in another State, and that the objection to the jurisdiction is well taken.

The act of 1867 differs materially from the act of 1836 and prior legislation upon the same subject matter. The first section therefore provides, "That in addition to the remedies now provided by law, if any husband or father, being within the limits of this commonwealth, has, or hereafter shall, separate himself from his wife, or from his children, or from wife and children, without reasonable cause, or shall neglect to maintain his wife or children, it shall be lawful for any alderman, justice of the peace or magistrate of this commonwealth, upon information made before him, under oath or affirmation, by his wife or children, or either of them, or by any other person or persons, to issue his warrant to the sheriff, or to any constable, for the arrest of the person against whom the information shall be made, as aforesaid, and bind him over, with one sufficient surety, to appear at the next Court of Quarter Sessions, there to answer such charge of desertion."

The second, third and fourth sections define the proceedings

to be had after the binding over. It will be observed that this act differs from the act of 1836 in these noticeable particulars.

First—The proceedings are to be had upon the oath of the party injured, and are not based upon complaint made by the guardians of the poor. In point of fact the latter have no control of the proceedings.

Second—The process issues in the name of the commonwealth.

Third—The binding over is to the next term of the court "to answer the charge of desertion."

This act would seem not only to provide additional remedies, but also to apply to another class of cases than those embraced by the act of 1836. Under the latter act the question of domicile is an important one. It applies only to cases where the person deserted is left "a charge upon the district," and no one can be such a charge unless he or she shall have a settlement within the district. But the act of 1867 is broader in its terms. It allows any wife who has been, or shall hereafter be deserted by the husband, the said parties being within this commonwealth, to make complaint to an alderman, who thereupon issues his warrant. Such a proceeding is entirely independent of the guardians of the poor. They have no control of it, nor are they even referred to in the act. The latter makes no allusion to the party making such a complaint, being a charge upon the district. The act of 1867 would seem to create a distinct offence, to wit, that of desertion, which may be committed within our jurisdiction, whether the parties are domiciled here or not—just as a non-resident may be arrested for an assault and battery or a larceny committed by him. This would seem to be the reasonable construction of the act. Whether it was wise to make our State a battle ground for residents of other States to settle their domestic difficulties, we shall not pause to inquire. Our duty is to administer the law as we find it. The act of 1867 is entitled "An act for the relief of wives and children deserted by their husbands and fathers within this commonwealth." The whole scope of the act implies that the desertion must take place within this State. Indeed, this is always necessary to give jurisdiction in a criminal case. Applying these views of the law to this case, we are brought to the inquiry, did the defendant desert his wife within our jurisdiction? The uncontradicted evidence is that the desertion took place in Massachusetts, in January, A. D. 1869. The parties have never lived together since. The wife, meeting her husband in a railroad car at Wilmington, on his way to join the army in a distant territory, follows, or rather accompanies, him to this city, and procures his arrest while stopping over night at the Continental Hotel. He refuses to see her upon their

arrival in this city, and it is argued that this amounts to a desertion here. We cannot assent to this view of the case. The desertion is a single act. It was complete in January, 1869, and was committed out of this State. To hold that where a man deserted his wife nearly two years ago in another State he may be arrested in any county or State in which his wife may happen to meet him *in transitu*, would make the way of a matrimonial transgressor hard indeed. Suppose the desertion were an indictable offence. Could the defendant be convicted for daily desertions covering two years or twenty years? Would not the plea of *autrefois convict* or *autrefois acquit* be a flat bar to a subsequent indictment for the same desertion, no matter how long it may have been continued? And if so, why should we split up this offence into as many different offences as there are days during the continuance of the alleged desertion.

As the bearing of the act of 1867 upon this case was discussed by the counsel upon the argument, I have thought it proper to state my views thereof. I decide only the case before me, and that I am compelled to dismiss for want of jurisdiction. In view, however, of the conclusions to which I have arrived in regard to this act of 1867, I decline to take any action upon the warrant issued under said act.

William B. Mann and Lewis C. Cassidy, Esqs., for complainant.

E. H. Hanson and Daniel Dougherty, Esqs., for the defendant.

[Legal Gazette, December 18, 1870, Vol. 2, p. 395.]

Court of Common Pleas, Philadelphia County.

McMULLEN v. ORR.

- 1 The summoning of a sheriff's jury in a landlord and tenant proceeding is a judicial act, and can only be performed by the sheriff himself and not by his deputy: hence a return that "I summoned twelve substantial men of my balliwick," etc., signed C. M. P., deputy sheriff. P. L., sheriff, is irregular.
2. Where the defendant makes a clear and direct affidavit that she held the premises in dispute under a lease made to her before the rendition of the judgment on which the plaintiff bought, the aldermen and jury should not give judgment, and this, even though the defendant had made a former affidavit, which the latter contradicted, they cannot pass upon the credibility of the affiant.
3. Partiality, corruption and extortion, properly proved are sufficient reasons for setting aside the proceedings of a sheriff's jury in a landlord and tenant proceeding and may be taken advantage of on *certiorari*.
4. Where in such a proceeding the jury refused a continuance asked because of the sickness of one of the parties' counsel, and afterwards granted it only on the terms of imposing a large sum, \$45, as "costs," there would be sufficient ground for setting aside the proceedings.

Sur certiorari.

Opinion by ALLISON, P. J. Delivered December 10th, 1870.

This is a proceeding to obtain possession of premises, mentioned in the complaint before two aldermen, and sheriff's jury. Several exceptions have been filed to the record as it is brought

up on certiorari. The sixth exception is, that the freeholders or jurors were not summoned according to law. In *Railroad v. Heister*, 8 Barr, 445, it was decided, that under the act which directs a precept to be issued to the sheriff, commanding him to summon a jury, it is irregular for the sheriff to select a jury from a list of names prepared by his deputy. The intimation in *Noringer v. Ayres*, that perhaps the deputy sheriff may be permitted to select jurors, is held not to be law, and the principle is asserted that it is a judicial act, requiring judgment and discretion, which cannot be deputed to another, that no one but the sheriff is competent to perform that duty.

The return to the precept before us is that in obedience to the writ, I summoned twelve substantial men of my bailiwick, and I did also summon James Orr and Martha Baird, the tenants in possession of said premises, to be and appear at the time and place within commanded; so answers Chas. P. Maguire, deputy sheriff. Peter Lyle, sheriff. This brings the return clearly within the principle asserted in *Railroad v. Heister*. The return to the whole proceeding is, that the deputy performed the entire duty, which the Supreme Court say can only be performed by the sheriff himself, and the sheriff has appended his name to the return, below that of Maguire, as if by way of endorsement of what the deputy had done. If a deputy cannot aid the sheriff to the extent of selecting and making out a list of names for his principal, from which the sheriff may summon the requisite number of freeholders, much less can he alone select, summon and make return, or join with the sheriff in the performance of that duty.

The exceptions founded on the refusal of the aldermen and jury to forbear giving judgment are well taken. Martha Baird made affidavit before the inquest, attested by both aldermen, that she believed she was entitled to hold possession of the premises, as against the plaintiff, that she did not hold the same by, from, or under Caroline McLearn, as whose estate the same was sold, by title derived to her, subsequent to the judgment or order of the court under which the sale was had, but by a different title, to wit, a lease from the estate of Caroline McLearn, which will not expire until the 24th of January, 1870. And on the same day, and before the said inquest, she made an amended affidavit, in which she sets out that she entered into possession of the premises in dispute, under title derived from Caroline McLearn, as whose estate the same was sold, before the judgment of the court, under which the execution and sale took place.

These affidavits are apparently contradictory, but the last one is a full compliance with the requirements of the act of Assembly, and may be regarded as substituted for the first, or as explanatory of the mistake of fact, which is there mentioned. The

aldermen and jury undertook to pass on the credibility of the affiant, and to disregard the affidavit, though it was full according to the requirement of the law; this we think they could not do, and when an affidavit such as the law demands, had been presented to them, accompanied by the necessary recognizance, which was done in this case, they ought to have forbore to give judgment.

Several exceptions, go to the refusal of the jury to continue the hearing, on account of the sickness of the defendant's counsel; the requirement of the jury by which the defendant Orr was compelled to pay \$45 costs before they would continue the case; the continuance of the case at subsequent meetings because of the absence of a juror, and of one of the aldermen at another meeting, without requiring them to pay costs.

The last reasons are not well taken; if the jury was not full, or if one of the aldermen was not present, it was a good ground for refusing to proceed in their absence, and the imposition of costs on them would have been wholly unauthorized. But it is equally clear, that it was an unauthorized and an oppressive act, to require the defendant to pay what were called the costs of that meeting, amounting to the large sum of \$45, as a condition upon which the continuance would be allowed. In the first place the sum demanded was largely in excess of the legal costs of the meeting; and the second objection is, that the jury and the aldermen by so doing, exacted pay for their services, before the termination of the cause; it was taking advantage of the situation of the defendant, by which costs in advance of their being due were extorted from him: and is wholly unlike an order of a court granting a continuance, upon payment of costs. In the case before us, it was putting the costs into their own pockets; an adjudication by the court, is a decision on the rights of third parties, who are parties litigant, the one case differs greatly from the other.

It is not usual for courts to compel a plaintiff to proceed with his cause, if he is surprised by the absence of counsel, on account of sickness. It is the right of a party plaintiff or defendant, to be represented by counsel; who is employed to protect the proper interests of his client, and when by no fault of their own, parties are found to be unrepresented, a due regard for the rights of suitors would require, that an honest application for continuance for this reason should be respected. In this case it is impossible to question the *bona fides* of the claim to a continuance on the ground on which it was placed, it therefore ought to have been granted.

If a cause is so conducted, as to justify the charge of partiality, corruption and extortion, it would be a good reason for setting aside the proceedings. For these causes, upon ground being properly laid by affidavit, the court may go into proofs,

in order to determine the truth of the charge. It is one of the exceptions to the rule, that upon *certiorari* nothing but the record is brought up, and this is allowed, that justice may be done, and that suitors may be protected, where they would otherwise be defenceless. If it were necessary to rest the reversal of this judgment and setting aside these proceedings on this ground, we would be inclined to do so, but as there are other manifest legal defects in the case, as it stands before us, we sustain the exceptions and set aside the proceedings.

R. R. Smith, Esq., for the exceptors.

W. R. Culler, Esq., contra.

[Legal Gazette, December 16, 1870, Vol. 2, p. 396.]

Register's Court, Philadelphia County.

IN re WEST'S WILL.

1. Under section 51, act of 15th March, 1833, an appeal lies from all judicial acts as well as decisions of the register of wills to the Register's Court, hence an appeal will lie from his award of an issue into the Common Pleas, under section 13 of said act.
2. Where the evidence was that the testator, at the time of his making the alleged will, offered for probate, was a very old man, and the testimony as to his capacity was conflicting, an award of an issue by the register was proper.

In the matter of the alleged will of Robert West, deceased.

Motion to dismiss appeal.

Opinion by *PERCIE, J.*

By the 13th section of the act of 15th March, 1832, it is directed that whenever a caveat shall be entered against the admission of any testamentary writing to probate, and the person entering the same shall allege as the ground thereof any matter of fact touching the validity of such writing, it shall be lawful for the register, at the request of any person interested, to issue a precept to the Court of Common Pleas of the respective county, directing an issue to be formed upon the said fact or facts, and also upon such others as may be lawfully objected to the said writing.

In *Bradford's Appeal*, 1 Parsons, 153, it was said, that the register, if required, is bound to grant an issue to the Common Pleas. But in *Wikoff's Appeal*, 8 Harris, 283 it is said, a register of wills is certainly not bound to award an issue whenever it is demanded. The register is empowered, but not required, in every case, to send every contested fact to a trial at law. When the evidence has been heard, it is for the register, in the exercise of a legal discretion, to decide upon it, or refer the decision to a jury; and the propriety of his determination may be examined on appeal. See, also, *Graham's Appeal*, 11 P. F. Smith, 43; *Cozzen's Appeal*, 11 P. F. Smith, 196.

By the 31st section of the act of 15th March, 1832, it is directed that "from all the judicial acts and decisions of the several registers, appeals may be taken to a register's court of the respective county, to be appointed and called by the respective register in the manner prescribed by the act."

The language of this section of the act is very broad, and permits appeals to be taken not only from the decisions of the register,—which is a term expressive of his final determination of the matter before him,—but, also, from his judicial acts, a term which implies his preliminary doings and determinations before his final decision of the matter. Thus, if the register should refuse a caveat to be entered, or to admit a party having an interest to contest the will, from these judicial acts an appeal would lie to the Register's Court, because, though the acts are preliminary to the final determination, they are vital to it; for without them there could be no proper determination of the matter; and the refusal of them would be a denial of justice. So his award of an issue, is a subject of review in the Register's Court. For, as was said in *Wikoff's Appeal*, the register has not an arbitrary discretion in the matter. Though the witnesses, to establish a will, swear all one way, their testimony may be encountered by evidence of bad character, or other matter to raise a question for a jury; but, where their testimony is consistent, and they are neither contradicted nor impeached, a jury would not be allowed to find against it; and it would be a vain thing to award a trial which must necessarily result in a particular way.

It was said, at the argument of this case, that the 25th section of the act of 1832, shows that no appeal can be taken to the Register's Court when a precept for an issue is directed by the register into the Common Pleas. The language of that section, so far as it applies to this matter is as follows: "Where objections are made, or a caveat is entered against the probate of any last will and testament, and no precept for an issue is directed by the register into the Common Pleas as aforesaid, he shall, at the request of any person interested, appoint a register's court for the decision thereof.

The language in this section is predicated of an issue properly awarded by the register, and not of an issue awarded when it should not have been awarded; otherwise it would defeat the appeal given by the 31st section. Whilst the other view makes the law harmonious with itself, and with the decision in *Wikoff's Appeal*.

The parties, therefore, having a right to appeal, there remains the question, Was the appeal in this case properly taken?

Robert West, at the time of his decease, was a very aged man, and there was much testimony submitted to the register

touching his capacity to make a will. His testamentary capacity was affirmed on the one side and denied on the other. The evidence exhibited that there was a contested fact touching the validity of the alleged will, which made it proper for the register to award an issue to determine this fact.

The act of the register in awarding the issue is sustained, and the appeal is dismissed.

Wm. J. McElroy and Wm. A. Porter, Esqs., for motion.

G. Coles Purves, McG. J. Mitcheson, G. T. Bispham, and W. L. Hirst, Esqs., contra.

[Legal Gazette, December 23, 1870, Vol. 2, p. 403.]

Register's Court, Philadelphia County.

IN RE TITLOW'S WILL.

1. A caveat is a kind of entry left in a book kept in the register's office, to stop the granting of probates, administrations, etc., without the knowledge of the party entering it; as the party objecting may not know what the precise objection is, until he sees the instrument under which the opposite party claims, it is not necessary that the caveat should state the specific objection.
2. The proper practice is, for the objecting party to file an affidavit disclosing the grounds of objection upon the production of the instrument under which the other party claims.

In the matter of the alleged will of George Titlow, deceased.
Sur appeal from the register.

Opinion by PEIRCE, J. Delivered December 17th, 1870.

A caveat was filed in the above matter with the register of wills, in the following form, viz.:

"I, Margaret Garman, one of the heirs-at-law of the late George Titlow, of the city of Philadelphia, do hereby caveat and protest against the probate of any last will and testament or instrument in the nature thereof, being or pretending to be the testament and last will of the said George Titlow, until examination thereof in the proper court, and the decree of the said court be therein pronounced."

A like caveat was filed on behalf of Maria J. Cowan, another of the heirs of said decedent.

After the subscribing witnesses had been examined in support of the will, the counsel for the heirs made application for a day to hear witnesses to prove that, at the time of the execution of the alleged will, George Titlow, the decedent, was in such a physical and mental condition that he was incapable of making a will.

To this application, the counsel for the parties offering the will for probate objected, and denied the power of the register to hear the proposed testimony upon the ground that in the caveats filed no fact is alleged, no want of mental capacity, alleged, no denial of the proper execution of the will, and no

demand for an issue authorized by the act of Assembly, and that therefore the inquiry of the register is confined simply to the witnesses to the will, and the cross-examination by those who have entered the caveats; and that therefore a *prima facie* case for the grant of letters testamentary has been fully established, and that the register is authorized to grant letters to the executors.

The register decided to hear the testimony proposed by the counsel for the heirs, from which decision this appeal was taken.

A caveat is a kind of entry or memorandum left in a book kept for that purpose in all registers' offices, to stop probates, administrations, licenses, dispensations, faculties, institutions, &c., from being granted, without the knowledge of the party that enters it, in the following form:

Let nothing be done in the goods of A. B., late of C., in the county of D., deceased, without notice to E., proctor for F. G., having an interest (or the widow and relict, or a creditor, &c., of the said deceased). Proctor's Ecclesiastical Practice, title, Caveats, page 68.

The object of the caveat is to give caution to the register not to proceed until the party entering the caveat have notice. In many cases, until the alleged will is offered for probate, a party interested may not know what to object to it. It may be a forgery, and he must see it to enable him to know this. It may be of a date anterior to the making of another will; or of a date subsequent to a period when the decedent was capable of making a will; and to determine this the alleged will must be seen; and, as a matter of right, it can only be seen when it is offered for probate.

It is not necessary, therefore, nor even possible in many cases, that the matter to be objected to the alleged will can be stated in the caveat. It is sufficient if it be objected at the time the will is offered for probate. The proper mode of doing this is in writing, setting forth the fact or facts which are alleged against it. In this case, the matters alleged against the paper purporting to be a will were stated orally by the counsel for the heirs, and were reduced to writing by the register. This may be sufficient in our practice, but the more formal and certain mode is to set them forth in writing, with an application for leave to make proof of them; or, if an issue be desired, for an issue.

In *Bradford's Appeal*, 1 Parsons, 158, it was said: To enable them to award the issue, the court must know the precise point of dispute, and that can only be known from the evidence laid before them, or at least, by an affidavit of the party asking the issue, setting forth with clearness and precision a state of facts irreconcilable with those alleged by his opponent.

This reasoning applies with like force in a proceeding before the register, who is a judge, and should proceed with due regard to the regularity and certainty of the proceedings before him.

This appeal is dismissed with instructions to the register to proceed to hear the proofs offered by the counsel for the heirs, on his filing an allegation, under oath or affirmation, setting forth the facts offered to be proved by the heirs against the said alleged will, and craving leave to make proof of them.

[Legal Gazette, Dec. 30, 1870, Vol. 2, p. 409.]

Court of Common Pleas, Philadelphia County.

IN EQUITY.

ASHTON v. PARKINSON.

1. A. gave his bond with warrant of attorney to P. to secure certain payments due by his brother, which F. entered up and on which he issued execution.
A. filed his bill to restrain the enforcement of the *fi. fa.*, alleging,
 - 1st. That the arrangement under which the bond was given was to be kept secret, and that P. had violated this by divulging it.
 - 2d. That the bond was to be left in the hands of F., P.'s attorney, and that P. had taken it out of his hands.
 - 3d. That he had testified to certain of these matters which he had agreed to keep secret.
 - 4th. That he had entered up the bond and issued execution in violation of the terms on which the bond was given.
- F., the attorney, and the sheriff were joined with P. as defendants. *Held:*
2. That the rule of law is that equity will not restrain the collection of debts, and that as the answer fully responded to and denied the allegations in the bill, the injunction would not be granted.
3. That the sheriff was improperly joined as a party; the plaintiff in the execution was the only proper defendant.
4. That F. was improperly joined and that he could not make discovery; it was his client's right to prevent his divulging confidential communications.

Sur motion for injunction.

Opinion by ALLISON, P. J. Delivered December 24th, 1870.

Samuel K. Ashton brings his bill of complaint against Robert B. Parkinson, to restrain the collection of a judgment for \$10,000, confessed by plaintiff in favor of Parkinson, on the 2d day of February, 1870. With Parkinson are joined as defendants, Peter Lyle, late high sheriff, and Thomas H. Foreman. The prayer of the bill as to Lyle, is to restrain him from further proceedings on a *fi. fa.* on said judgment, which was issued out of the Supreme Court as of January Term, 1871, No. 24, and that Foreman make discovery of the facts in relation to the matters set forth in the bill. The relief prayed as to Parkinson is that he be enjoined from proceeding by execution or other process upon said judgment, deliver up the bond of the plaintiff to be cancelled, and that he account for and repay to Samuel K. Ashton, the moneys which plaintiff had paid on

account of the bond. The equity of the bill is an alleged violation of an agreement by Parkinson, which, as plaintiff asserts, was the sole consideration for the execution of the bond on which judgment has been entered and execution issued.

The breaches of this agreement as set forth in the bill are, 1st, divulging statements touching the business relations between himself and George H. Ashton, a brother of the complainant. 2d. That he took the bond out of the hands of Foreman, who had been of counsel for him in the negotiation and settlement of the business out of which this proceeding springs. 3d. Testifying to the matters which he had agreed to keep secret in a suit which he had instituted against Foreman; and 4th. Entering up judgment, and issuing execution thereon.

It is recited in the bill, that the brother of the plaintiff, George H. Ashton, was indebted in a considerable sum of money to Parkinson, who was about to collect the same by attachment under the act of March 17th, 1869. The plaintiff, with the sole desire to assist his brother, and to prevent damage to his business by the anticipated suit, gave his bond with warrant of attorney, to secure the payment of the debt due to Parkinson, in monthly payments of \$500, on the first day of every month, up to and including the first day of July, 1870, and on that day to execute a mortgage, conditioned for the payment of \$7,547.32 in three years from its date. Four payments, of \$500 each, were made; the last one on the first day of May, when, as plaintiff alleges, in consequence of a violation of the condition on which he executed the judgment, he ceased to make further payments, or otherwise to complete his agreement with Parkinson.

The plaintiff avers that it was agreed by Parkinson, that the entire transaction was to be kept secret, to avoid injury to the business of George H. Ashton; that the preservation of secrecy was made an essential part of the agreement, and that the defendant, Foreman, as attorney for Parkinson, and with his, Parkinson's full knowledge and consent, should retain in his possession the bond of plaintiff; and in support of this averment, appends to his bill a copy of a paper signed by Foreman on the 2d of February, 1870, as attorney for Parkinson, in which it is agreed, "that the bond and warrant will not be recorded or entered, save upon the forfeiture of any condition or conditions, mentioned in the warrant. It is understood and agreed by the parties, as a consideration of good faith inducing this bond as a settlement, that the papers shall remain in the hands of Mr. Foreman, counsel for Mr. Parkinson, and the avoidance of all publicity in respect to all the circumstances of the settlement, strictly promised." On the same day another paper was executed by Foreman as attorney for Parkinson, set-

ting forth among other things that the bond, by request of Samuel K. Ashton and the consent of Parkinson, should remain in Foreman's possession until the mortgage was executed.

These allegations of the bill, supported as they seem to be by the two papers signed by Foreman, attorney for defendant, are met by a denial set up by way of answer by Parkinson, as to the consideration which induced plaintiff to execute the bond. The answer avers, that George H. Ashton being bailee of Parkinson of \$10,000, in United States bonds and cash, and refusing after repeated demand, to deliver the bonds and money which had been deposited for safe keeping only, criminal proceedings had been instituted against George H. Ashton, and that the magistrate who heard the case, had already returned the same to the Court of Quarter Sessions for trial. The defendant asserts, that the material question before them was the abandonment of all proceedings by law against the said George H. Ashton, arising out of his misappropriation and conversion of the property of Parkinson to his own use, and that the allegation of secrecy as an inducement to the execution of the bond and warrant, is a mere pretence and afterthought. In support of the reasonableness of this assertion it is alleged, that long previous to the execution of the bond and warrant, it was well known among those having business relations with George H. Ashton, that he had become embarrassed in his pecuniary matters; his negotiable paper having gone to protest in June, July and August of 1869, and that many suits had been brought against him, and judgments obtained in the courts of this city.

This denial of the substantial equities of the plaintiff's bill is fatal to his application for relief upon the ground upon which he mainly rests. In the sixth paragraph of his complaint, he claims that for the causes spoken of in the fourth paragraph, he is entitled to the aid of this court by way of injunction: the acts of the defendant here referred to are, first, speaking of the transactions between the plaintiff, the defendant, and George H. Ashton, in the presence of a third person; and second, that in a suit between Parkinson as plaintiff, and Thomas H. Foreman, defendant, he testified and called witnesses to the transactions, which induced the execution of the bond. This is effectually answered at this stage of the proceedings by the denial of Parkinson, that he had come under any promise or agreement to keep secret the transactions referred to, as an inducement held out to plaintiff for the obligation which he assumed, and that no such consideration entered into the execution of the bond. We are not even called on to weigh the proofs by which this assertion is supported and denied, as it stands before us upon the oath of the plaintiff alone, contra-

dicted as it is by the oath of the defendant. This denial would be sufficient to prevent the granting of the special injunction which the bill prays may be accorded, but it ought not to be overlooked, that the plaintiff has not attempted to call to his support the testimony of the witness, who he says was present when Parkinson spoke of the business transactions, in violation of his agreement not to divulge them; nor have we by affidavit or by offer of proof at bar, the particulars of the testimony in the suit between Parkinson and Foreman. If we had not the emphatic denial of the defendant, which defeats upon this ground the equity of the plaintiff upon his prayer for relief by special injunction, his request would be denied because of the indefiniteness of statement as to what was said upon that which it is claimed, violated the agreement or promise of the defendant. To say that Parkinson spoke of the transactions, and that he testified and called witnesses to testify in relation to them, affords little if any light upon the question raised by these allegations of the bill; even if this is true, and if it were material, it does not necessarily follow that anything was revealed which it was necessary should be kept secret, or that the transactions were spoken of in such a way as in any degree to damage the interests of George H. Ashton. If the conversation or testimony of which plaintiff makes complaint, was of this character, or was calculated to produce this effect, he should have set it out in detail, that the court might judge of the fairness of the ground on which he seeks to make of no effect his bond given to the defendant. It is asking relief by summary interposition upon a uncertain and unascertained premises. This is contrary to the principle that the plaintiff must in any case make his right to a special injunction clear beyond doubt before it can be awarded; a principle which applies in all its force to an application of this kind. In *Winch's Appeal*, 11 P. F. Smith, 424, the doctrine is affirmed that equity will restrain a creditor only where he is clearly and indisputably proceeding against right and justice, to use the process of the law to the injury of another. The jurisdiction of a court of equity to prevent or restrain acts contrary to law, and prejudicial to the rights of individuals, cannot be used to obstruct the collection of debts. *Hunter's Appeal*, 4 Wright, 194, which is often cited as an authority in controvetion of the well-settled doctrine in Pennsylvania, that it is the right of a creditor to seize and sell the debtor's interest in the property, whatever that interest may be, is not in conflict with the principle, but is in entire agreement with it. In *Hunter's Appeal* the general doctrine is fully conceded in the opinion of the court; and the execution there was restrained only because the attempt to sell the undisputed property of the wife, to satisfy the debt of the husband, was clearly

an act contrary to law, it being in direct conflict with the married woman's act of 1848, which in term says that this shall not be done. And in *Lyon's Appeal*, 11 P. F. Smith, 15, which enjoined the inequitable use, which a creditor attempted to make of an admitted incumbrance on the wife's title, which she was willing to pay off, the court said they were not to be understood as deciding that in an ordinary case of a conflict of interest, a party can come into equity to restrain a plaintiff from his right of execution. The case of the plaintiff, we think, has no such specialties as to make it an exception to the general rule. The third breach of the agreement upon which the plaintiff relies, is admitted by the defendant. He indeed denies that the settlement of February 2d, 1870, was in any degree induced by a promise on his part, to allow the bond to remain in the hands of Thomas H. Foreman until the monthly payments should have been completed, although this is stated in the agreement signed by Mr. Foreman, of the same date with the bond. The bond was placed in the hands of other counsel, in consequence of a misunderstanding which grew up between the defendant and Mr. Foreman, prior to the first of July. Is this such a material violation of the agreement or promise of Parkinson, as to take from him his right to hold the plaintiff to the fulfilment of the obligation which he assumed? The defendant swears that he made no such precedent promise; that the allegation which is made by plaintiff is a mere pretence and afterthought; but apart from this denial we do not regard this stipulation of the agreement as an essential part of it. Mr. Foreman at most was to be but the holder of the bond, because he had been of counsel for Parkinson, and because there was professional service yet to be performed; the mortgage was to be prepared and executed, and this was to have been completed by the counsel of the defendant, who at that time was Mr. Foreman. But it is difficult to understand how it could be of vital importance to the plaintiff, or in any way of consequence to him, whether the bond was in the custody of one person acting as attorney and counsellor for the defendant, or of another. For cause which was deemed sufficient, other professional advice and assistance was sought; and with this change, the bond was placed for safe keeping and for such use as defendant might be entitled to make of it, in other hands. The plaintiff has not explained how or in what way his own interests or those of George H. Ashton have been injured by the deposit of the bond in the keeping of the present counsel for the defendant; and as injury from this cause is not asserted, we cannot regard the ground assumed by the plaintiff as presenting any valid reason for staying the hand of the defendant in proceeding to collect his judgment, if otherwise entitled to reap that which his execution may bring to him.

The only other reason assigned in support of the prayer for relief against Parkinson falls, if we are right in our conclusions as we have stated them above. It was clearly understood that the bond might be entered up, if there was a failure to comply with any one of the conditions named in the bond; this is negatively stated upon the face of the instrument itself. The breaches of condition are set forth in the paper filed with the bond and warrant; no one of which are denied by the plaintiff; namely, his refusal to pay the instalments of \$500, due respectively, on the first days of June and July, as well as the refusal on part of plaintiff, to execute and deliver to defendant, his mortgage for \$7,547, according to his agreement.

It may not be out of the way to remark, that the sheriff ought not to have been made a party to the bill; he was performing a duty imposed on him by another tribunal, whose process he was required to execute, and for the non-fulfilment of which, by any default of his, he incurred a pecuniary responsibility, as well as exposed himself to punishment of a different character. It is through the plaintiff in an execution, that relief in a proper case is reached, and not by an order which places the officer charged with the execution of process, between two fires, so that he cannot escape damage from one or the other.

The fourth prayer is, that Foreman may make discovery of the facts in relation to the matters set forth in the bill, as fully as the same are within his knowledge. To this he makes answer in part, but claims that as he was of counsel for Parkinson, he has been improperly joined as one of the defendants in the bill. It is the privilege of the client which seals the mouth of counsel, and for this reason, nothing which was communicated to him by Parkinson can be considered as properly before us.

The injunction granted *sec. reg.* is dissolved.

James T. Mitchell, Esq., solicitor for plaintiff.

Wm. Ernst, Esq., solicitor for Parkinson.

[Legal Gazette, Dec. 30, 1870, Vol. 2, p. 412.]

Court of Common Pleas, Philadelphia County.

IN RE PHILADELPHIA ARTISANS' INSTITUTE.

1. The requisites of an application to the Court of Common Pleas, for a charter, defined.
2. Also the objects for which that court may grant a charter.

Sur application for charter.

Opinion by PAXSON, J. Delivered January 7th, 1871.

The object of this association, as set forth in the charter, is
 "the promotion and encouragement of mechanical, manufac-

turing and useful arts, by such means and measures as they may deem advisory and expedient."

This is certainly very indefinite, but there is a still more serious objection. I have looked in vain through the acts of Assembly for our authority to charter an association with this object. The nearest approach to it is the power to charter "associations for the promotion of science," but we cannot extend this to the "mechanical, manufacturing, and useful arts" by judicial interpretation; nor can we enlarge the terms employed in the act of Assembly so as to embrace other objects, even though they may be equally meritorious. The term "science" has a specific meaning, and is distinguished from the arts in this, that art is that which depends on practice or performance, and science that which depends on abstract or speculative principles. The theory of music is a science; the practice of it is an art.

But this charter is radically defective in other respects, viz.:

1. The membership is not restricted to citizens of this Commonwealth.

2. The rights and duties of the members, the powers and functions of the officers, the qualifications of members, and the causes for which they may be expelled and the manner of effecting the same, and the mode in which the property of the corporation shall be disposed of, are all to be provided for hereafter by the by-laws and ordinances of the corporation. This would make the charter a mere matter of form, and enable the association to introduce into the by-laws the most obnoxious regulations, without any opportunity for the court to pass upon their validity or propriety. These are all matters which should have been clearly defined and set forth in the charter, and their omission is fatal.

3. There is no limitation as to the amount of property the corporation may hold.

There are other defects in this charter, but the above are sufficient to require us to withhold our approval of it.

A number of other charters have been handed to me for examination. With a single exception I have been compelled to return them without approval, and have endorsed thereon our objections. In view of the large number of applications of this nature, and of the extremely crude and careless manner in which many of the charters are prepared, we have thought it proper to indicate briefly some of the essential features which every charter should contain:

1. The membership must be restricted to citizens of this Commonwealth. *The Butcher's Ben. Association*, 11 C. 151.

2. The name of the proposed corporation must be stated, and

said name should be entirely distinctive from that of any other incorporation in the same locality. 6 Pitts. Leg. Jour. 161.

3. The objects of the association must be clearly defined, so as to satisfy the court that they are within the meaning of the law. *The National Literary Association*, 6 C. 150.

4. The articles, which should clearly define the rights and duties of the members. 6 C. 155.

5. The conditions under which the parties propose to associate.

6. The location where said corporation is intended to be situated, or its principal business transacted.

7. That all by-laws to be adopted by said proposed corporation for its government, shall be consistent with the Constitution and laws of the United States, the constitution and laws of this commonwealth, and with the proposed charter.

8. Any clause providing for an amendment of the charter must set forth that such amendment shall be made in conformity with law.

9. If the power of expulsion is introduced, the charter must clearly define the causes for which a member may be expelled. An indefinite or vague statement of the offence is not sufficient. The court will not approve a charter which gives a majority of the association power to expel any member "guilty of any offence against the law." Any such or kindred expression is too general. 2 Wr. 298; *Ibid.* 299; 11 C. 151; 2 Bin. 448; 6 S. & R. 469.

10. In charters of building associations the number and value of the shares proposed to be issued must be stated.

11. In charters of beneficial societies there must be a clause restricting the application of their funds to the objects declared to be the purpose of their association. 6 C. 155.

12. In all charters where a cash capital is provided for, the amount of such capital must be stated, as also the number and value of the shares.

13. Every charter must contain a limitation of the amount of real and personal estate to be held by such corporation. The limitation of real estate must not exceed the maximum prescribed by the act of Assembly; and the limitation as to the personal estate must be reasonable, taking into view the objects of the association, the court reserving the right to approve the latter in its discretion.

14. Every charter should be written upon one sheet of paper or parchment. Interlineations in a charter are not proper, and if the same occur in a material part the charter will be rejected. 6 C. 154; 11 C. 80.

It may not be inappropriate to designate the several objects

for which the Court of Common Pleas is authorized by law to grant charters of incorporation. They are—

1. Associations for literary, charitable, or religious purposes; beneficial societies or associations, fire engine or hose companies. Act of 13th of October, 1840. Purdon, 196, plac. 11; P. L. 5.

2. Associations for the promotion of science or agriculture; cemetery or burial associations; societies for the detection of thieves and the recovery of stolen property. Act of 20th February, 1854. Purdon, 197, plac. 15; P. L. 90.

3. Musical societies and associations. Act of 6th of April 1859. Purdon, 197, plac. 16; P. L. 377.

4. Mutual saving fund, loan or building associations. Act of 12th April, 1859. Purdon, 129, plac. 1; P. L. 544.

5. Associations for the purpose of insuring horses, cattle, and other live stock against loss by death from disease or accident, or from being stolen; water, hook and ladder companies; building associations; musical clubs or associations; teachers' institutes or associations; hotel companies; skating parks, associations and clubs for the advancement of athletic sports, including base ball clubs, and barge and fishing clubs, and fire insurance companies. Act of 26th of March, 1867. Purdon, 1456, plac. 3; P. L. 44.

6. Saving fund associations, or societies for the accumulation of funds, and the distribution of the same among its members, without banking or discounting privileges. Act of 12th of April, 1867. Purdon, 1456, plac. 4; P. L. 70.

It is quite possible that I have overlooked some of the objects for which associations may be chartered by this court, but it is believed the foregoing is substantially correct.

[Legal Gazette, Jan. 13, 1871, Vol. 3, p. 12.]

Court of Common Pleas, Philadelphia County.

IN EQUITY.

JUNCTION R. R. Co. v. BOYD.

1. The railroad company built their road along Thirty-second street, in the city of Philadelphia, and, being below grade, covered it with an arch on which earth was packed, so that travel on the streets was not interfered with. Under an ordinance of councils the defendants built a temporary chapel on the archway,
Held:

2. That the councils could not authorize such building.

3. That the railroad company had an exclusive right to their roadway, and were the proper parties plaintiff.

Opinion by PAXSON, J. Delivered December 31st, 1870.

The Junction Railroad Company, by the terms of their charter (acts of May 3d, 1860, P. L. 780) were authorized "to construct a railroad, commencing at a point upon the Philadelphia

and Reading railroad, at or near the bridge of said company, near Peter's island, in the river Schuylkill, thence by the best route to a point upon the Pennsylvania railroad, within one mile east of George's run, at the village of Hestonville, thence by the line of the Pennsylvania Road by the most direct and practicable route to a point upon the line of the Philadelphia, Wilmington and Baltimore railroad."

Under and in pursuance of the power thus conferred by their charter, the said railroad company have constructed their road through a portion of West Philadelphia—the same being located from a point north of Market street to a point south of Chestnut street, upon the line of Thirty-second street, which street was laid out upon the plan of the city of Philadelphia, but not then opened south of Chestnut street. Between the points referred to, the road has been arched over and filled up, making it in effect a tunnel, over which the travel upon Market and Chestnut streets now passes. This tunnel continues for about 75 feet below Chestnut street, far enough to prevent horses from being frightened by approaching trains, after which the said road is a deep uncovered cut for some distance, and so continues until the natural grade of the ground brings the road out upon a level with the surface. The land upon the line of Thirty-second street, below Chestnut, belonged to the estate of Edward Shippen Burd, deceased. The executors of this estate presented a petition to the court, in conformity with law, for a jury to assess the damages for the taking of their land by the said company, and for injury to their adjoining property; and such proceedings were had thereon, that an award was made of \$10,000 in favor of the estate, which award has been confirmed by the court, and the amount thereof paid by the company.

The bill further alleges that the defendant, Henry M. Boyd, and his agents, contractors and workmen, have recently entered upon and taken possession of all that part of said strip of ground so condemned to and paid for by the said company, being the whole of Thirty-second street fronting on Chestnut and extending southward to the mouth of said tunnel, and are now actually engaged in erecting thereon a certain stone and frame structure for the use and occupation of himself and certain other persons associated with him, and who have recently formed, or are about forming, a religious, association under the name of the West Chestnut Street Presbyterian church. The said building is erected upon stone foundations set in the ground, and is directly over the arch of the tunnel aforesaid.

The defendant does not claim to erect said building under any license from the said company, or from the executors of Burd's estate; but justifies his act under an ordinance of councils, passed October 22d, 1870, in these words: "The select and common councils of the city of Philadelphia do ordain, that

permission be and the same is hereby granted to the West Chestnut Street Presbyterian church to erect a temporary wooden chapel on Thirty-second street, below Chestnut street, in the twenty-seventh ward: *Provided*, That the said building shall be removed at any time hereafter upon thirty days' notice, to be given by the chief commissioner of highways, on the passage of a resolution by councils to that effect."

Upon the filing of the bill of complaints the usual *ex parte* injunction was granted; subsequent to which the defendant put in a *pro forma* answer, admitting the facts as set forth in the bill, and submitting himself to the order of the court. Whereupon the case was set down for argument upon bill and answer. Upon the hearing, however, the defendant asked leave to withdraw his answer, and to substitute the names of the trustees of the West Chestnut Street Presbyterian church as defendants. It was alleged that the answer was put in pending proceedings for a settlement of the difficulty, and with a view to that end.

While a court of equity might, in a proper case, allow other parties having an interest to come in and defend, we would not be justified in substituting other parties as defendants without the consent of the plaintiff; and while I do not sustain the motion to withdraw the answer, I have treated the latter as an affidavit, and decide the case as upon a motion to continue the special injunction.

That the defendant had no right to erect this building upon the lot in question is too plain for argument. He has shown no legal authority from any one to do so. He is a mere trespasser. The ordinance of councils amounts to nothing. The city did not and does not own the land, and consequently had no authority to erect a structure thereon, or to authorize others to do so. The only right which the city could possibly have had was to use the ground as a public highway, and this right is practically taken away by its use by the railroad. If said ground had not been so taken then the only parties entitled to build upon the lot would have been the owners of the fee, or some one claiming by, through or under them.

But it is contended for the defendant that, conceding he has no right to build upon this lot, the complainants are not entitled to the equitable relief prayed for, because they are not the owners of the fee, and have but an easement in the property. It is undoubtedly true that where a railroad company take land for the construction of their road by virtue of the right of eminent domain, they do not acquire a title in fee to the land so taken, but only a right of way for the purposes aforesaid.

The general principle has been long and clearly settled that when the land of an individual is appropriated to the use of

a public highway, whether a canal, railroad, turnpike, or ordinary country road, the fee remains in the former owner, and the public have but the right of passage; and on the abandonment or disuse of the grounds as a way, the owner can reclaim or occupy it. *The Western Pennsylvania Railroad Co. v. Johnston*, 9 P. F. S. 290; *Lance's Appeal*, 5 P. F. S. 16; *Jessup v. Louchs*, Ibid. 350; *Lewis v. Jones*, 1 B. 336, *Sanderson v. Haverstick*, 8 Id. 294; *Fisher v. Coyle*, 3 Watts, 407; *Barclay v. Nowin*, 6 Peters, 498. But it is also true that the use by a railroad company of land taken by them for the use of their road is practically an exclusive one and permanent in its nature. And herein it differs essentially from the case of land taken for an ordinary highway. For a railroad company must, from the very nature of their operations—for the security of life and property—have the right to the exclusive use of the road for themselves and workmen, and to exclude all concurrent occupancy by former owners in any mode or for any purpose. The view of the law is fully sustained by the authorities. See *Railway Co. v. Davis*, 2 Dev. & Bat. 467; *Wheeler v. The Railway*, 12 Barb. 227; *Mungen v. Railway*, 4 Comst. 349; *Hazin v. The Railway*, 2 Gray, 574; *Redfield's Amer. Railway Cases*, 250, and notes; *Railroad v. Holton*, 32d Vt. 43.

In the latter case, it was held that one whose land has been taken, appraised, and paid for by a railroad company, under their charter, for railroad purposes, has no right to enter upon or use such land for any purpose which in the least degree endangers or embarrasses its use by the company for any of the objects which the railroad is intended to accomplish; and that it was unlawful for the owner of the fee to dig turf along the line of the road, as his doing so might tend to create dust to the annoyance of passengers travelling in the company's cars. And this, it will be borne in mind, was a case between the company and the owner of the fee, and not between the company and a mere trespasser.

But the defendant contends that in the case of a tunnel the right to the use of the surface remains in the owner of the fee, and that he may use it for agricultural, building or other purposes not inconsistent with the use and enjoyment by the company of their easement. It is not necessary to decide this broad question, though, even if it were, a great deal could be said on the other side. In *Ramsden v. The Railway Company*, 1 Exch. 723, it was held that where a permanent tunnel was made through the land without disturbing the surface soil, it amounted to a permanent using of the land; and undoubtedly in such case the owner would be entitled to claim damages for the use of the surface soil, for the reason, with others, that the company may cut through and use it. They would have the right to

sink shafts through for the purposes of light and ventilation. But in this case there is no tunnel, in the proper sense of the term. The company first made a deep cut, and then arched over their track, and placed two or three feet of soil over the crown of the arch. It is in effect a mere covered way, and the building complained of rests not upon the surface soil, but upon the structure placed there by the company. If the latter had covered their road with a wooden roof instead of the more permanent brick arch, can it be pretended that any stranger, without color of title to the land, could add another story to it for his own convenience? If the principle contended for here be correct, it is difficult to see where it would stop, and the road of the company might be built over its entire length by merely leaving room enough for the passage of the trains. Such a view is entirely inconsistent with that exclusive control over their road which, from the nature of things, a railroad company must possess. But the very act which the defendant has attempted is expressly prohibited by law. Section 11 of act of 16th of April, 1838 (Purdon 845, plac. 55), provides that "no person shall construct any building, wharf, platform, switch, sideway, lateral railroad or crossing place, or make or apply any device whatever on the ground set apart for, or forming part of, or on banks or excavation of any railroad as aforesaid, without permission given under the authority of the * * * managers of the proper railroad company * * * which permission shall only be given in writing by a person duly authorized for that purpose; and if any person shall commence or make any such construction or device without such permission, or shall not conform to the direction of the proper officer or agent in the case, in the construction of such building, wharf, platform, switch, sideway, lateral railroad, crossing place, or device as aforesaid, such person shall, for every such offence, forfeit and pay a sum not exceeding one hundred dollars, and the officer or agent having charge of such railroad may, at the expense of such person, remove or destroy every such obstruction or device as aforesaid." This act received a construction by our Supreme Court in *Downing v. McFadden*, 6 H. 334, in which it was held that trespass would not lie against the officers of a railroad company for tearing down the scaffolding of a person who was attempting to build along the line of the railroad, and who was digging into the banks of the road in order to get a foundation.

I have not adverted to the fact as to how far the building complained of may injure the road or endanger the safety of the arch. Nor is it, perhaps, very material under the view which we take of the law of this case. The danger would depend somewhat upon the strength of the arch. The company were

not bound to build it of sufficient strength to support a church building with a congregation therein, or to support any building whatever. And, if there is no danger now, what assurance have we that it may not endanger it hereafter? The foundations of the chapel may let in the water in such way as ultimately to injure the mason work, or foundations of the arch. From such contingency the company have a right to be protected. The law holds these corporations to a strict account if human life is lost upon their roads. Can this continue to be the case if the courts determine that they have not the exclusive control over the land taken for their roads, and that any mere trespasser may at his pleasure erect churches or other buildings over and upon the crown of an arch built by the company for their own and the public protection? If we take from a railroad corporation the exclusive use and control of their roadway, we shall be driven of necessity to a corresponding modification of the strict rules which we apply to them when injuries result to persons or property from the acts or omissions of their employees or agents.

The injunction is continued until the further order of the court. The erection of this building was continued after notice and bill filed; and, I am informed, even after special injunction granted. The plaintiffs, if they insist upon it, are perhaps entitled to a decree of abatement under the prayer for general relief. As the building was only erected for a temporary purpose, it is possible the plaintiffs may be contented with proper assurances of its removal within a reasonable time. But we will make such decree as the plaintiffs are entitled to whenever counsel prepare and submit the same in accordance with the rules of the court.

Thomas Hart, Jr., and James E. Gowen, Esqs., for plaintiff.
Samuel Dickson, Esq., for defendant.

[Legal Gazette, January 6, 1871, Vol. 3, p. 4.]

Court of Quarter Session, Philadelphia County.

In re POWELTON AVENUE.

1. The widening of a street already opened of the width of fifty feet to that of eighty feet, is not such a public benefit as will justify the imposing on the city of all the damages awarded for the taking of land.
2. Hence where in such a case, with the exception of those few instances in which no damages were awarded at all, the jury of view imposed all the damages on the city, amounting to some \$48,000, the report will be set aside.

In the matter of the exceptions to the report of the jury to assess damages for the widening of Powelton avenue.

Opinion by PAXSON, J. Delivered January 7th, 1871.

Powelton avenue, east of the Lancaster pike, is opened of the width of eighty feet, and the improvements thereon are generally of a superior character. West of the said pike, this avenue, so far as opened, is of the width of fifty feet. It is now proposed to open it from the Lancaster pike westward to Forty-second street, of the width of eighty feet. Such widening would seem to be very greatly to the advantage of property owners in the vicinity. Indeed, it is hardly possible to examine the plan of the street as proposed to be widened without coming to the conclusion that not only property fronting on this avenue, where the lots are of the depth of one hundred feet and upwards, but also upon all of the cross streets within a square of said avenue, would be materially enhanced in value by the change from a fifty to an eighty foot street. Improvements of a superior order would probably follow such widening, and, in time, replace those now in existence of a less desirable character. Every building of the kind first above referred to could hardly fail to benefit surrounding property. This is the view suggested by an examination of the plan submitted with the report of the jury; but if we take said report, and the opinions of property owners as our guide, we should be forced to a different conclusion. The former have assessed the damages—nearly the whole of which are for the widening of the said avenue, at the sum of \$48,210. This entire amount has been put upon the city. The jury do not appear to have been able to see any benefit to owners of property on Powelton avenue whose land is not taken, or to owners of adjacent property. In some few instances they have declined to give damages for land taken, upon the ground that the remaining property of the same owner was benefited to a corresponding degree; but generally they have allowed damages in a most liberal spirit. Individuals owning deep lots on Powelton avenue, where only a thin slice is taken off from their fronts are awarded damages of greater or lesser amounts. Various reasons were urged before the jury, and pressed upon the argument before the court, why the respective properties would not be benefited by the proposed widening. Some property owners prefer to build upon the side streets, entirely ignoring the valuable front on an eighty foot street, and experienced builders and real estate brokers were examined before the jury to prove the great advantage of so improving upon the side streets. A number of exceptions have been filed to the report of the jury. Some except because they have not been awarded any damages—others, because they have not been awarded enough. The city excepts because all of the damages have been placed upon her, and no portion thereof upon the owners of property benefited by the proposed widening. But the difficulty is that no

one seems to have been so benefited. Almost every one whose property is taken, alleges that he is injured thereby far beyond any possible benefits, while those who own adjoining property not taken can see no advantage to said property by reason of the widening of the street.

The opening of a street is a matter which, perhaps, in most cases is of general interest and advantage. Such opening creates another public highway for the use and accommodation of all our citizens. But the widening of a street already opened, from a fifty to an eighty foot street, is not a matter which particularly benefits the general public. If, then, such widening would be productive of nothing but loss to the property owners in the immediate vicinity, it would seem to be unwise to inflict such an unnecessary evil upon them. Still more unwise would it be to add over \$48,000 to the debt of the city without any corresponding benefit, and for a matter in which the general public have no especial interest. We have concluded, therefore, to sustain both the exceptions filed by the property owners and by the city, and to set aside this report, and we do so with the less hesitation from the fact that the urgent necessity for an eighty foot street so near to a wide street like Market has not been made to appear. Should property owners change their views upon the importance to them of having Powelton avenue opened of the full width of eighty feet, it is, of course, competent for them to have another jury; when, if they are willing to pay for that which benefits them exclusively, their labors may possibly be crowned with a different result.

Exceptions sustained, and report set aside.

[Legal Gazette, Jan. 13, 1871, Vol. 3, p. 13.]

Court of Quarter Sessions, Philadelphia County.

COMMONWEALTH v. STACY.

1. In an indictment for libel where the words charged do not necessarily import criminality they can, in pleading, only support the indictment by reference to extrinsic circumstances which show them to have been used in an obnoxious sense.
Semble: That where the colloquium is wanting the count may be amended.
2. Where in such an indictment there is a precedent statement, that the prosecutors were engaged in business, such statement will be sufficient to sustain the innuendo, that the words charged were with intent to injure prosecutors in their business standing.
3. A publication made by a circular issued by a mercantile agency to its subscribers, is not privileged; it might be otherwise, if made only to those having dealings with the person to whom it relates.

Demurrer to indictment for libel.

Opinion by ALLISON, P. J. Delivered January 7th, 1871.

In *Stitzell v. Reynolds*, 9 P. F. Smith, 488, we have the last

reaffirmation of the old doctrine, that where the words, spoken or printed, which are charged to be slanderous or libellous, do not necessarily import criminality, they can in pleading only support an action or indictment by reference to extrinsic circumstances which show them to have been used in an obnoxious sense. The common illustrations are there given—the word *foresworn* becomes actionable only when shown to have been predicated of one who had given testimony under the sanction of a judicial oath, and hence the necessity of a colloquialism, about time, place and circumstances, so that it might appear upon the face of the pleadings that the word *foresworn* had reference to an oath taken in a judicial proceedings: because a false oath taken under other circumstances is not perjury, though it is an immoral act.

Judge Sharswood says: Perhaps the best illustration of the rule of pleading in these cases is to be found in *Barnham's Case*, 4 Rep. 20. The words laid are: *Barnham burnt my barn (innuendo), a barn with corn.* The action was held not to lie, because burning a barn, unless it had corn in it, was not a felony; but, remarked De Gray, C. J., in *Rex v. Horn*, Cowp. 684, if, in the introduction, it had been averred that the defendant had a barn full of corn, and that in a discussion about that barn the defendant had spoken the words charged, an *innuendo* of its being the barn full of corn, would have been good. This subject is fully treated, and numerous authorities cited, in note to Wharton's *Precedents of Indictments*, 544, under title *Libel*, chapter seven. In the case of *Miller v. Maxwell*, 16 Wendell 9, where the plaintiff averred, by way of *innuendo*, that the defendant, in attributing the authorship of a certain article to a celebrated surgeon of whiskey memory, or to a noted steam doctor, meant by the appellation the plaintiff, it was held, notwithstanding the *innuendo*, the declaration was bad for want of an averment, that the plaintiff was generally known by those appellations, or that the defendant was in the habit of applying them to him, or something to that effect. The *innuendo* must have precedent matter to which to refer, so that whatever is intended to be thus alluded to, must be stated before the *innuendo*, which is to apply it to the matter charged to be libellous. It is objected by the defendant, that in this respect the indictment before us is radically defective. In the first count it is charged, that with the intent to injure, oppress, aggrieve and vilify the good name, fame, credit, and reputation of Patrick Cahill, and to bring him into public hatred, contempt and ridicule, the defendant printed and published the libellous matter set forth in this count, of and concerning the said Patrick Cahill. The words of the alleged libel do not charge or impute to the prosecutor any act which imports crim-

inaulty, and for which he could be indicted. Upon principal, and the authority of repeated decisions, therefore, we must hold that this count of the indictment is defective, because there is no colloquium; no averment of precedent matter to which the *innuendo* can apply. The rule laid down in *Hawkes v. Hawkes*, 8 East. 431, is conclusive against the sufficiency of this count; that where the words do not of themselves naturally convey the meaning imputed by the *innuendo*, but also where they are ambiguous and equivocal, and require explanation by reference to some extrinsic matter to make them actionable, it must not only be predicated, that such matter existed, but also that the words were spoken of and concerning that matter. The libellous words here charged have reference, if to anything injurious to the defendant, to his business standing, and is calculated and intended to injure him in his credit, that injury must reach him through those with whom he dealt. But it is not averred or laid as matter precedent to the *innuendo*, that the prosecutor was in business, or that he carried on any particular occupation, and that the words were spoken of and concerning such business or occupation. The publication which is made the foundation of this indictment is as follows:

"Mercantile agency, notification sheet, R. G. Dun & Co., proprietors. Thursday, March 3d, 1870. No. 9. Strictly confidential. Subscriber to reference book: We have information which changes the ratings of the undermentioned names. An indication that a change has occurred should be made in your book in all cases by making a dash (—) against the name. If specially interested in any of the parties, particulars may be obtained at our offices. ¶ These notifications are confined strictly to changes materially affecting the ratings in our reference book. The insertion of a name herein does not always imply a failure, but simply that circumstances have occurred, the particulars of which should be obtained by parties interested.

"Pennsylvania, 103, O'Brien & Cahill.

. . . Shoes . . . Philadelphia."

As this is a purely mercantile paper, whatever harm it could inflict on Cahill would be done to his business standing and credit, and, indeed, it is so charged in the indictment; the *innuendo* laid is "meaning thereby that a change had occurred materially affecting the solvency of the said Patrick Cahill in his business." But if Patrick Cahill was not doing business; if he had never been thus engaged, or had retired therefrom, then the alleged libellous matter could not injure him in the manner set out by the pleader; and as we have no formal or substantial averment of this fact to support this *innuendo*, it stands in this count of the indictment as a pointless and harmless statement.

In the second count this defect in pleading is not so apparent. The allegation is made that the purpose of the defendant in the publication and circulation of the offensive statement, was to injure and vilify the good name, fame and credit, reputation and business standing, of Peter O'Brien and Patrick Cahill, shoe manufacturers, copartners under the firm name of O'Brien & Cahill, and to bring them, the said O'Brien & Cahill, into public hatred, contempt and ridicule, did write, print, publish and exhibit, a certain malicious and defamatory libel of and concerning the said O'Brien & Cahill, &c. There is in this no technical colloquium or averment, that there was as between the defendant and other persons, a discourse or communication of any kind touching the business of O'Brien & Cahill, but there is a statement which precedes the innuendo, that the firm, are shoe manufacturers; that their business is carried on under the firm name, and that the purpose of the publication was to injure the reputation and business standing of O'Brien & Cahill, this is not a formal precedent statement of the matter which it is the office of the innuendo to carry into, or connect with the publication set out in the indictment, but it does that which an artistic pleading of the same facts would accomplish; it gives point to the libellous publication, and indicates in what sense it is to be interpreted; the innuendo can thus be understood as connecting the libel with the business or trade of the prosecutors, and though it is not laid in the indictment that the publication was printed and exhibited of and concerning the business of the firm, yet it is charged that the object of the defendant in exhibiting his alleged libellous publication, was to injure the firm reputation and business standing of O'Brien & Cahill, who are manufacturers of shoes. The 11th section of the criminal procedure act, Purdon 251, provides that every indictment shall be deemed and adjudged good and sufficient in law, which charges the crime substantially in the language of the act of Assembly, or, if at common law, so plainly that the nature of the offence charged may be easily understood by the jury. This section has introduced a material change into the requirements of criminal pleading, and whilst it cannot be claimed for it that it has swept away all of the specialties of the old system, for the charge must be so plainly stated if at common law, that it can be easily, and to this may be added accurately, understood by the jury, yet where there is reasonable certainty in an indictment it is to be maintained, and we think the second count of this indictment is well pleaded.

It is objected as against the sufficiency of the indictment that the innuendo contradicts the language laid as being libellous, and undertakes to change the meaning of the words. It was argued in support of this cause of demurrer, that the language

set out may be interpreted in a double sense, and that the plaintiffs are not therefore justified in placing on them the meaning which is given to them in the libel. But this objection cannot, we think, be sustained, for while an innuendo cannot enlarge, add to, change or extend the meaning of the previous words, where they are ambiguous, equivocal and require explanation, or may be taken in a double sense, the innuendo is used in order to attach such meaning to them, as the plaintiff claims, was intended or may think necessary to render them actionable or sufficient to support an indictment for libel. In the indictment before us, nothing more is sought to be accomplished by the innuendo, than to give to the words published an explanation, which, if true, constitutes the libel. Nor has the pleader, by means of the innuendo, sought to attach to the words set forth in the indictment, a meaning inconsistent with what they may naturally import, when we remember that they are published by a mercantile agency, and the professed purpose of the author is to give information to the subscribers to the agency.

We also hold that there is nothing that requires us to declare the indictment defective for the second cause of formal demurrer assigned against the sufficiency of the bill. There is nothing to support the allegation, that it does not set forth accurately the alleged libellous paper. As far as appears from the matter set out, it is the entire publication, or, at least, the whole of that which is complained of as constituting the libel. If there is in the publication matter which precedes and follows the alleged libel, it would have been a more formal statement of the offensive portion of the publication to have said, in certain parts of which said circular there were and are contained false, wicked, &c., matters of and concerning the said O'Brien & Cahill; but under our statute we think it would be going too far if we should decide that this omission, which is one of form merely, vitiated the indictment.

But it is further assigned for demurrer against the bill that the matter set forth is on its face a privileged communication, made in the performance of an obligation and duty, being a confidential communication, made by a mercantile agency to subscribers, who employ the agency for the purpose of supplying them with information for their use in the management of their business. A communication is privileged even though it be defamatory, where there is an interest or duty to make the matter complained of known, if it is done *bona fide* and without malice. *Moore v. Farrall*, 4 B. and Adop. 871. *Shipley v. Todhunter*, 7 C. & P. 680. A merchant may communicate his knowledge to one who solicits information, as to the reputation or business standing of a customer. If he volunteers such statement it is otherwise. *King v. Watts*, 8 C. & P. 614. And

it was held in *Gelling v. Kosf*, 3 C. & P. 160, that a circular letter sent by a secretary to the members of a society for the protection of trade against sharpers and swindlers, furnishing information respecting certain bill transactions, is not a privileged communication. The distinction taken there was, that if the letter state particular facts, it will not constitute a libel, and it was left as a question for the jury, whether the society really and in good faith intended to give the particular information which the letter contained. But, if the letter contain a general statement, such as that the party mentioned in it is considered as an improper person to be ballotted for, it is otherwise. The same principle is maintained in *Ward v. Smith*, 6 Bing. 749. A letter written by a correspondent of a foreign mercantile house, intended to be confidential concerning third persons engaged in mercantile transactions, imputing to them notoriety for everything but fair dealing, and strict adherence to their engagements, was held not to be privileged. The indictment before us is founded on a communication made to only one member of the association, so far as we have information from the libel itself, and it would be a good defence to the charge of publishing a malicious libel, to show that the paper was sent to but one person, who was interested in knowing all that is stated or referred to in the communication, as to the ratings of O'Brien & Cahill, and that the publication was without malice, the defendant having knowledge of such facts as warranted him in making the statement contained in the communication, or having reason to believe them to be true, made them to persons who were interested in obtaining the information. But we cannot agree with the position taken by the defendant, that because he is connected with a mercantile agency, he may communicate to every person who becomes a subscriber to his agency, statements prejudicial to the business or moral standing of the merchants of the land, whether the persons to whom the information is sent have an interest in receiving it or not. In any case in which they have such an interest and the agency have come under obligation to perform a duty of this kind, it would, doubtless, be regarded as a privileged communication, if without malice, facts are communicated which are necessary to the protection or proper for the information of the persons to whom they are sent, and this was the ruling in the case of *Lawler v. Colton Oil Com.*, Eng. Com. Law Rep. 4 vol., page 262 (new series); there every person to whom the circular was sent, having an interest in the business of the association, of which he was a member, was entitled to be informed of the transactions of the body, the publication of which was charged to be libellous. But can anything like this, with fairness be claimed of an association whose members are

scattered over all the land, but a small portion of whom can have any interest in knowing the ratings, as they are called, of the particular names which are periodically sent out with such remark as is calculated to injure their reputation and business standing. A business such as that conducted by the defendant, if properly managed, may be of the greatest service to the merchants and business men of the country, but if carried on with a reckless disregard of the rights of others, may be converted into an evil, against which no man can protect himself; its operations are secret; everything is sent out under the garb of confidence; and thus the poisoned arrows which are launched in darkness may strike down the purest and most solvent in the land; no business man is safe if this can be recognized and protected by the law as a privileged communication. There is no great hardship imposed on an agency of this kind if they are required to know beforehand that their statements are true, and that the persons to whom they are sent have an interest in receiving the information; and this could be accomplished by requiring every subscriber to furnish to the agency, from time to time, the names of the persons with whom they had established business relations, or who may have applied to them for credit. It is no sufficient reply to this to say it would be troublesome and expensive to the agency, they are bound to submit to an inconvenience which, while it does no substantial harm to them, has a just regard for the rights of others. Persons who are injured by the course of business pursued by an organization of this kind, have a right to invoke the protection of the law, and to hold every one thus acting responsible for the legal consequences of their publication. An agency of this kind is but another illustration of the old fable of the boys and the frogs, that which is both pleasant and profitable to the one party, may, in a financial view, be death to the other.

The first count being defective merely for want of a precedent statement to explain the innuendo, it may properly be amendable under our statute, and as this defect was not formally assigned a cause of demurrer to the bill, but was made orally and at bar, we will not now declare the demurrer as to it sustained, but allow it to stand over for the present. All the other grounds of demurrer are overruled, both as to the first and second counts of the indictment.

Under this indictment the defendant was tried by a jury and acquitted.

Charles H. Sidebotham, Esq., for the commonwealth.

Thos. J. Diehl, Geo. W. Biddle, and Samuel Wagner, Jr., Esqs., for defendant.

United States Circuit Court, Eastern District of
Pennsylvania.

IN ADMIRALTY.

CAFIERO v. WELSH.

1. A bill of lading is a receipt and a promise, it acknowledges that certain goods have been received on board of a vessel, and engages to deliver them, and in so far as it is a receipt it is only *prima facie* evidence, and may be contradicted by parol.
2. Where, therefore, the only defence to the payment of freight was a discrepancy between the amount of cargo stated in the bill of lading, and that delivered; and the testimony of the officers of the ship was direct and explicit that all that was received was delivered: *Held*, that the defence was not made out.

Appeal by respondents from the decree of the District Court for the Eastern District of Pennsylvania.

Opinion by McKENNAN, Cir. J. January, 1871.

A common carrier is bound to deliver the specific goods intrusted to him, at their appointed destination, in the condition in which they were received by him, subject only to such deterioration as is necessarily incident to their transportation, and to such perils as may be, by legal implication or express agreement, excepted from his liability. His responsibility begins only when he assumes the custody of the goods to be transported. Hence the master of a vessel is responsible for his cargo, from the time of its delivery to him, and only for what is so delivered. Its kind and quantity, the place to which it is to be carried, and the person to whom it is to be delivered, are subjects of proof, and of these the bill of lading is the customary and appropriate evidence. It has been expressively described as a receipt and a promise. It acknowledges that certain goods have been shipped, and engages to deliver them. While, therefore, it may be regarded as conclusively establishing the employment of the carrier, and the essential stipulations of the contract, yet, as between the shipper and the carrier, it is only *prima facie* evidence of all matters descriptive of the cargo, and, as to these, may be modified or contradicted by parol. 1 Sprague, 72. "In regard to receipts, it is to be noted, that they may be either mere acknowledgments of payment or delivery; or, they may also contain a contract to do something in relation to the thing delivered. In the former case, and so far as the receipt goes only to acknowledge payment or delivery, it is merely *prima facie* evidence of the fact, and not conclusive; and therefore the fact, which it recites, may be contradicted by oral testimony. But in so far as it is evidence of a contract between the parties, it stands on the footing of all other contracts in writing, and cannot be contradicted or varied by parol. Thus, for example, a bill of lading, which partakes of both these characters, may be contradicted and explained in its

recital, that the goods were in good order and well conditioned, by showing that their internal order and condition were bad; and, in like manner, in any other fact, which it erroneously recites; but, in other respects, it is to be treated like other written contracts." 1 Greenl. on Ev., sect. 305.

In the present case, the libellant, as master of the Italian brig Matilda, contracted with C. Donner & Co., of Palermo, for the transportation of a cargo of brimstone, from Girgenti, in the island of Sicily, to the port of Philadelphia. The cargo was shipped, and a bill of lading signed by the master, which recites the quantity as 4030 cantars, equivalent to 705,250 pounds. The vessel sailed, and, without touching at any intermediate port, reached Philadelphia, where the cargo was again weighed by custom house officers, and fell short of the weight stated in the bill of lading 43,180 pounds. The shippers, through the respondents as their agents, claim to deduct from the freight the value of this deficiency; and this is the subject matter of the present controversy.

The difference in the weight at Philadelphia, and as stated in the bill of lading, is too great to be explained by any allowable estimate of loss or wastage, incidental to the handling or transportation of the cargo. The master is primarily accountable for it, because he accepted the shipper's weight, as the *prima facie* measure of his liability. But he is conclusively bound only for the quantity of lading actually received by him. If this is determinable, it is immaterial to speculate as to the cause of the discrepancy.

The only evidence to charge the master is the bill of lading, in which he acknowledges the receipt of 4030 cantars of brimstone, and the testimony of D. Marcus Marcello, who says, "I know that the sulphur was put on board said vessel the 13th July, 1869, and several days previously, and was always loaded in the bay to the amount of 4030 cantars." If the import of this is, that the quantity of sulphur stated was actually shipped on the vessel, the witness does not inform us of his means of positive knowledge, further than that he was charged with the loading of the vessel as the agent of the charterers; that he had no responsible connection with the weighing of the sulphur, but that this office was performed by others, that he was on shore, and that the weight of the cargo was checked by a revenue officer on board the vessel, are facts which appear clearly in his deposition. His testimony, then is not the best accessible proof of these facts, of which they are susceptible.

It appears that the sulphur was in a warehouse on shore, was there weighed by D. Marco Attardo, agent of the warehouseman, supervised by the comptroller of the customs, that it was thence carried by men in baskets to small lighters, and by them

two miles out to sea, where it was transferred to the vessel. Each of these lighters was furnished, on every trip, with a clearance, called a "Let Pass," which authorized the discharge of its cargo only on the Matilda, and which were surrendered to a revenue officer on board, and are preserved in the custom house. Thus the quantity carried by each of these small vessels, the number of trips performed by each, and the aggregate quantity delivered on board the Matilda, may be ascertained at the custom house, and are provable by the evidence in its possession. Why this proof, of such decisive pertinency, is not furnished, is not explained. Its absence is certainly remarkable, and justifies a presumption unfavorable to the defence. But this is not the only significant omission. The weighing of the sulphur is shown to have been done by Mr. Attardo and the comptroller of the customs. As they were especially charged with this duty, the weight in detail of the several parcels, and the computation of these weights, by which the aggregate was ascertained, were peculiarly within their knowledge. Their testimony has not been taken. We are then left to find that the quantity stated in the bill of lading was the accurate result of the weighing, and that it was actually delivered on board the vessel, upon the testimony of a witness, who is not shown to have personal knowledge of either of these facts, but who seems to have affirmed them upon information derived from those who did know them. Under such circumstances, it cannot be assumed that the bill of lading derives material corroboration from the testimony of Mr. Marcello.

The bill of lading was prepared by the shipper's agent, and was signed by the master, upon the assumption that the weight of the cargo therein recited was correct. It has reference to the weight represented to have been ascertained at the warehouse, and is, therefore, to be taken as only formally admitting the quantity actually shipped. If the effect of this admission is not impaired by the absence of the demonstrative proof before referred to, it is overborne by the libellant's proof. The libellant himself, and the first and second mates of the vessel testify that the cargo shipped at Girgenti was put below the hatches, which were fastened down, and not opened or broken until the end of the voyage; that the vessel proceeded directly to Philadelphia, without stopping at any intermediate port, and that the whole cargo, as shipped, was delivered to the consignees. It would seem to be impossible that so large a quantity, as the deficiency here, could have been abstracted without the knowledge of these witnesses. Their testimony then must be accepted as true, or it must be rejected as wilfully false. Making due allowance for the interest of the libellants, and the relations of the other witnesses to him, I discover no suffi-

cient ground for imputing perjury to them, or for withholding credence from their testimony. Their statements, therefore, are to have the weight and efficacy which pertain to the testimony of unimpeached witnesses. They satisfactorily establish the controlling fact, that the whole cargo, shipped at Girgenti, was delivered at Philadelphia; and so the weight, officially ascertained at the latter place, is the conclusive measure of the libellant's accountability.

The decree of the District Court is therefore affirmed.

[Legal Gazette, Jan. 20, 1871, Vol. 3, p. 21.]

Court of Common Pleas, Philadelphia County.

IN EQUITY.

GILLIS v. HALL.

A decree of the court enjoined the defendant from using the name of "Hall" or "R. P. Hall" upon any such preparation as a certain one described as "Hall's Vegetable Sicilian Hair Renewer." The defendant commenced the manufacture and sale of an article which he designated "R. P. Hall's Improved Preparation for the Hair." Upon a rule to show cause why an attachment should not issue against him for a contempt in disregarding the decree of the court.

Held, 1. That a name has for certain purposes a commercial value. If the proprietor estimates that value and sells it to another person—to the extent and for the purposes for which he sold it, he has no right to use it.

2. The use of the name "R. P. Hall" by the defendant, is a palpable piracy of plaintiff's trade mark, and a clear evasion of the decree.

Opinion by PAXSON, J. Delivered February 1st, 1871.

This was a rule upon Reuben P. Hall, one of the defendants in the above case, to show cause why an attachment should not issue against him for a contempt in disregarding the order and decree of this court, made in the above case, on the 30th day of July, 1870.

The decree referred to is in these words: "That the defendants, and each of them, their servants, agents and employees be enjoined from making or selling any preparations as and for, or purporting to be those of the said plaintiff, and mentioned and described in said bill as 'Hall's Vegetable Sicilian Hair Renewer,' and from using the name of Hall, or R. P. Hall, or Reuben P. Hall, either singly or in connection with others, upon any such preparation, and from making or using any trade mark, label or wrapper in imitation of those now in use by plaintiff, and from parting in any manner with the labels now in their possession, which are imitations of plaintiff's trade mark."

It is alleged, and not denied, that the defendant Hall has commenced the manufacture and sale of an article which he designates as "R. P. Hall's Improved Preparation for the Hair," and that upon the wrapper of his bottles are printed these

words; "R. P. Hall's Improved Preparation for Restoring the Hair." This preparation is entirely different from Hall's Vegetable Sicilian Hair Renewer, but is compounded by the same inventor, R. P. Hall. The style and general appearance of the bottles and labels differ essentially from those employed in putting up the Hair Renewer; and it was stated upon the argument that the defendant Hall had made such change in order to carry on his business without coming in conflict with our decree.

The said defendant has certainly misapprehended the scope of that decree, as well as the meaning of the term "trade mark." He may lawfully make any article known to commerce, which is unpatented, but he may not apply the trade mark of the plaintiff to any such article. It is also to be observed that there is a wide distinction between covenant not to engage in trade and covenant to restrain the use of a trade mark. The former may be void, as being against the policy of the law, while the latter, not being obnoxious to any such objection, will be enforced. In this case, the defendant, Hall, has taken from the plaintiff's trade mark that which gives it its chief value, viz.: The name of "Hall," and placed it upon his own. The plaintiff's article is known as "Hall's Vegetable Sicilian Hair Renewer." Strike out the name of "Hall" therefrom, and its distinctive characteristic as a trade mark is gone. It is not necessary to elaborate this point. Both of these parties, plaintiff and defendant, understand it thoroughly. The name of "Hall," as applied to preparations for the hair, was to a great extent, the consideration for which the one paid, and the other received the sum of \$30,000. In their article of agreement, this very matter is especially referred to. The defendant, Hall, expressly covenanted that "he would not use or allow his name to be used in the preparation of any similar articles." And again, "that he will allow the plaintiff the free, uninterrupted, and exclusive use of his name, in the manufacture and sale of said preparation." And yet it is conceded that he has prepared an article for a similar purpose—that he uses the name of "R. P. Hall" thereon, and says, that it is not "Hall's Vegetable Sicilian Hair Renewer," but that it is an improved article, and is compounded by the same inventor, R. P. Hall. This is an ingenious, but, at the same time, most palpable piracy of plaintiff's trade mark, and a clear evasion of our decree. The name of the defendant Hall, had, for certain purposes, a commercial value. He estimated that value by dollars, and sold it to the plaintiff. To the extent, and for the purposes for which he sold it, he has no right to use it. Persons have been repeatedly enjoined from using their own names as a trade mark upon their own goods. *Bajoris'*

case, and other cases cited in *Dixon Crucible Co. v. Guggenheim*, 2 Brewster, 331.

I have considered this case irrespective of the agreement dated December 31st, 1870, between defendant Hall and J. C. Ayer & Co., of Lowell, Massachusetts, assignees of plaintiff, and to whose use this suit is now marked. The chief value of said paper consists in the admission by the defendant—voluntary for aught that appears—that his said article, “Hall’s Improved Preparation for Restoring the Hair,” was being made in violation of the right of the said J. C. Ayer & Co. I regard that fact as sufficiently established without the admission of the defendant contained in the paper referred to.

Rule absolute.

Samuel Wagner, Jr., Esq., and *Mr. Attorney General Brewster*, for rule.

J. M. Moyer and *Amos Briggs, Esqs.*, contra.

[*Legal Gazette*, Feb. 3, 1871, Vol. 3, p. 36.]

Supreme Court of Pennsylvania.

AT NISI PRIUS. IN EQUITY.

BAILEY v. FITZPATRICK.

Equity will not interfere where a special jurisdiction over the subject matter is provided by the Legislature, but will remove any obstacle inequitably opposed to a party’s obtaining a hearing before the tribunal appointed.

Sur bill and answer.

Opinion by SHARSWOOD, J. Delivered February 4th, 1871.

This was on the list originally as a motion for a special injunction, but when called it was agreed to be considered as put down to be heard on bill and answer.

I think it is unquestionable that where an act of Assembly confers a special jurisdiction on any particular tribunal in regard to any class of cases, a court of equity ought not, and will not assume jurisdiction. The most that it will do is to remove any obstructions which may inequitably be interposed against the party’s bringing his cause to issue before the appropriate tribunal entrusted by the Legislature with its exclusive determination. Such is the case in reference to determinations of the board of wardens as to the erection or extension of wharves into the tideway of the river Delaware, under the acts of February 7th, 1818, Pamph. L. 72, and April 8th, 1868, Pamph. L. 756. The exclusive jurisdiction of revising their decisions is in the Court of Common Pleas, upon appeal by any person aggrieved. It is true such appeal must be entered within thirty days after the date of the decision, and the allegation of the plaintiff is that he had no notice of the decision of which

he complains until the thirty days had expired. The answer relies upon a notice by advertisement in the North American, a daily paper of this city. The act, however, does not provide for such advertisement, and it seems to me that in all cases the adjoining wharf proprietors are entitled to personal notice. I think therefore that all that can be done at present is to allow the plaintiff to amend his bill by making the board of wardens parties, and inserting a prayer that they shall be enjoined to re-open their decision and give due notice, that the plaintiff may have his legal right to appeal. The board of wardens are public officers, who can have no interest but in doing what is right, and no doubt upon a respectful application to them they will not require any process or delay.

Amendment allowed.

D. W. Sellers and Jas. W. Paul, Esqs., for plaintiff.

Pierce Archer, Jr., and Wm. L. Hirst, Esqs., for defendant.

[Legal Gazette, Feb. 10, 1871, Vol. 3, p. 44.]

Supreme Court of Pennsylvania.

AT NISI PRIUS. IN EQUITY.

EVERLY v. DURBOROW.

Where one partner contributed money to the common stock, and the other his time and skill, and the whole was lost: *held*, that the partner contributing the money could not recover any part of his loss from the other.

Sur bill, answer and agreement of counsel as to facts.

Opinion by SHARSWOOD, J. Delivered February 4th, 1871.

The question presented upon the agreed statement of facts, is one of some novelty; at least the industry of the counsel has not furnished me with any decisions which throw light upon it. Two persons enter into a co partnership; one agreeing to contribute \$10,000 as capital, the other nothing but his knowledge of the business. After two years the firm is dissolved, its affairs wound up, all its debts paid; and it is found that its entire capital has been lost. The partner who contributed the money capital now calls upon his copartner to bear half his loss, to repay him half the sum he put in. It is beyond a question that the money was put in as stock or capital; it was not an advance or loan to the firm. The article is unequivocal. "Everly shall contribute the sum of ten thousand dollars capital against Durborow's knowledge of the business." Mr. Lindley says: "Whatever, at the commencement of a partnership, is thrown into the common stock, belongs to the firm, unless the contrary can be shown." Lindley on Partn. 546. What is added does not contradict this. "At the expiration of this partnership, this capital shall be returned without interest

before final division of profits." But here there are no profits to be divided; there is no capital to return. Everly has lost his money, and Durborow has lost what he set against it, his time and services, enhanced in value by his knowledge of the business.

Bill dismissed, with costs.

[Legal Gazette, Feb. 10, 1871, Vol. 3, p. 44.]

Supreme Court of Pennsylvania.

AT NISI PRIUS.

GREGG v. NILSON.

The contents of a safe rented from a safe deposit company, are not liable to attachment for the depositor's debt in the hands of the company.

Sur rule on garnishees.

Opinion by SHARSWOOD, J. Delivered February 4th, 1871.

An attachment execution in this case has been served upon the Philadelphia Trust Safe Deposit and Insurance Company, as garnishees, and by their answer to interrogatories filed, it appears that the defendant rented from them a certain closet or safe in their vault, which is locked, and of which he retained the key until recently, when the same was returned to them. A copy of the contract by which this safe is rented is annexed to the answer. By the terms and regulations endorsed, it is expressly provided that only in case of refusal to surrender the keys and give up possession to the company at the expiration of the lease, on fifteen days' notice, is the company authorized to break open the safe; and then, if the contents are of sufficient value, they may hold them as deposits, and if not, remove them from the vault, and bear thereafter no further risk thereupon. The company shall use reasonable diligence that no unauthorized person shall be admitted to any rented safe; and beyond this this company will not be responsible for the contents of any safe rented from it, except by special agreement in writing. I think it very clear that these rented safes cannot be the subject of attachment under the act of June 16th, 1836, sect. 35. Pamph. L. 767. They are not "a debt due to the defendant, or a deposit of money made by him, or goods or chattels pawned, pledged or demised." The contents of the safe are in the actual possession of the renter of the safe; they have not been deposited with or demised to the company. I am asked to make an order upon the company to open the safe and file an inventory of its contents. This I am of opinion I have no power to do.

Rule discharged.

[Legal Gazette, Feb. 10, 1871, Vol. 3, p. 44.]

Court of Quarter Sessions, Philadelphia County.

In re THIRTY-FOURTH STREET.

1. The Court of Quarter Sessions has no jurisdiction to confirm the plan for a change in the lines of any street laid out to be widened or straightened by direction of councils, by the survey department, although such street is already opened.
2. The jurisdiction under the act of 1868, § 24, is exclusively in councils. It seems that the plan adopted by the survey department should be approved by councils.

Opinion by ALLISON, P. J. Delivered March 13th, 1871.

The first exception to the confirmation of the plan for a change in the lines of Thirty-fourth street, is grounded on the act of April 21st, 1855, which restricts the alteration of lines and grades of streets laid out on any public plan, or which have otherwise been established as public highways, to such of them as have *not been opened*.

Thirty-fourth street, in the portion of it which it is now proposed to alter, has for years been opened for common use, and is on the confirmed plan of the city. If the proposed change was sought to be carried out, under the general law, this exception would be well taken. The act of 1855 stands to prevent a change in lines and grades of opened streets. It is a most beneficial statute, because it tends to encourage the improvement of the city; giving confidence to those who expend their money, in the erection of buildings, which cannot be destroyed or impaired in value, by frequent or mere wilful change of lines and grades. The *unopened* streets are subject to no such restriction, but may be altered, subject to the approval of the Court of Quarter Sessions; the rule which is applicable to opened highways, being in a great degree inapplicable to such as have not been taken for public use.

It is under the authority of the 24th section of the act of April 14th, 1868, P. L. 1090, that a change in the lines of Thirty-fourth street is now proposed to be made. This section authorizes the councils of the city to widen and straighten any street laid out upon the public plans of the city, which they may think requisite to *improve the approaches to Fairmount Park*. The exercise of this authority is not made subject to the provisions of the act of April 21st, 1855, but is, we think, intended to free such action from the restriction which the law of 1855 imposes. The widening and straightening of streets which would facilitate the approach to the park, was, for obvious reasons, intended to constitute exceptional action on the part of councils; as it is in many respects desirable, that with as little of delay as possible, the approaches to the park should be made convenient to the public, who at great cost have purchased it for their own enjoyment and benefit. By the act of 1868, the delay incident to the usual mode of secur-

ing a widening and straightening of a street is avoided; and to the councils the authority is given, to do at once that which may be deemed by them necessary to accomplish the purpose contemplated by the passage of the twenty-fourth section of the act. It is not to be overlooked also, that the courts are powerless to make or to decree an alteration in this portion of Thirty-fourth street, under the general law in force in this city; and this 24th section does not profess to confer in express terms the authority we are now asked to exercise, nor can it, for the reason already stated, be taken to ourselves, by necessary or obvious implication. We think this construction of the twenty-fourth section is rendered much more conclusive and satisfactory, in view of the fact, that by the terms of the 7th section of the same law, authority is given to councils under supervision of the department of surveys, to make alteration in such portions of the plan of survey of the Twentieth, Twenty-fourth and Twenty-eighth wards, as may become necessary and expedient, by reason of the extension of the park; "and cause the same to be established, in manner as now provided by law, for revising and laying out plans of survey in the said city of Philadelphia." This section contemplates action by the Court of Quarter Sessions, and in this we have the evidence that when this law was passed, the propriety of requiring the approval of the court was present to the mind of the Legislature, in the establishment or revision of a plan of any portion of the city. And in the extensive revision which was authorized by the 7th section, conformity to the general law it made obligatory, while it wholly omitted it from the 24th section, which gives an unqualified power to councils to widen and straighten streets for the purpose designated in the said section. There is another objection to the confirmation of this plan, as it has been presented to us. There is no evidence of its having been directed by councils to be altered in the manner in which it comes into court, nor is there any proof, that, as it now stands, it has been submitted to councils for their approval. A general direction by councils to the board of survey, to revise the lines of Thirty-fourth street, so as to widen and straighten the street, does not carry with it an approval of the manner in which the survey department have carried out the general direction to revise. Every plan should in some way be approved by council, before we are asked to confirm the same. But as we are of the opinion that we have no jurisdiction in the premises, we refuse our decree of confirmation.

D. W. Sellers, Esq., for the exception.

E. Spencer Miller, Esq., contra.

[Legal Gazette, Mar. 24, 1871, Vol. 3, p. 93.]

Court of Common Pleas, Philadelphia County.

IN EQUITY.

LODGE v. RAILROAD COMPANY.

The act of 17th March, 1869, confers upon railroad, canal and slack-water navigation companies the power to widen, straighten or deepen their roadway or canal, "whenever in the opinion of the board of directors the same may be necessary to secure the safety of persons or property, and increase the facilities and capacity for transportation of traffic thereon." On a bill filed to restrain a railroad company from the exercise of the powers thus conferred, *Held*:

1. That the question of the time and mode of such widening, straightening or deepening, is one exclusively for the board of directors, and not subject to review by the court, except when exercised corruptly or capriciously. The obligation to pay the damages caused by the taking of the land is a sufficient protection to the owner.
2. That although such act is to be read *in pari materia* with the general railroad law, yet the limitation of the width of the roadway to sixty feet, contained in the prior act, does not apply to such widening, &c., under the latter one.
3. That the power given by the act when once exercised is an exhausted power, and hence the directors are justified in taking such quantity of land as will be necessary for the probable future wants of the company.
4. The taking of a breadth of road sufficient for four tracks, when only two are to be immediately laid, but the others will probably, in the estimation of the board, be needed, is not an unreasonable exercise of the discretion given.

Motion for a preliminary injunction.

Opinion by ALLISON, P. J. Delivered March 18th, 1871.

The plaintiffs complain against the defendants, that they are about to abuse the power, which the act of the 17th of March, 1869, P. L. 12, confers upon them to straighten and widen their road. The authority to enter upon the land of the complainants is not denied; nor are we asked to restrain them from so doing, except to afford time for an ascertainment and settlement of the damages which will be sustained by plaintiffs, by reason of the occupation and use by the defendants, of so much of said land as they may lawfully take for the widening and straightening of their road, or until security for the same be given by the defendants and approved by the court.

The claim of the plaintiff to equitable relief, is mainly grounded upon an allegation that more land is sought to be appropriated for the change of the lines and width of the road, than is actually needed for that purpose.

The plan which accompanies the bond tendered to Thomas Lodge, the owner of the fee in the land, exhibits a roadway of one hundred and ten feet in width, which the defendants propose to take; upon this point there is no dispute, but it is charged that this is at least twice as much land as is requisite for the location and construction of the railroad tracks, or other railroad works, which the defendants intend or contemplate soon to lay or place thereon, and that an appropriation of

a strip of ground 110 feet wide, is not to meet the *present* necessities of the company, but to provide for a supposed future need, upon which other tracks may be laid hereafter.

The act of March 17th, 1869, confers upon companies entitled to avail themselves of its benefits and privileges, an authority which is only restricted, by the terms of the act, to that which may be required to enable them to accomplish the purpose contemplated. The time when a widening, straightening or deepening of a railway, canal, or slackwater navigation is to be undertaken, is committed wholly to the discretion of such company, "whenever in the opinion of the board of directors, the same may be necessary, to secure the safety of persons and property and increase the facilities and capacity for transportation of traffic thereon." For these purposes they are authorized to purchase, hold, use or enter upon, take and appropriate land and material. The authority of the company, therefore, to determine the necessity for entering upon an undertaking such as this act makes provision for, is abundantly clear; the power to take the necessary quantity of land and materials, is also placed beyond dispute. But ample as this power is, it is not absolute; it has its limitations and restrictions, such as are implied in every grant of corporate right. These companies take under the act of 1869, that which is expressly given to them, and such further authority as may be necessary to carry into effect the general powers conferred, but nothing more. An obscurity or ambiguity in the act must be interpreted in harmony with this fundamental principle of corporate law. In full accord with it are our own cases of *Lance's Appeal*, 5 P. F. S. 16, and *Jones v. Tutem*, 8 Harris, 398, which are to the effect, that taking land compulsorily, is to be strictly construed, as in derogation of private right. Every prerequisite which is imposed must be observed, the clear intentment of the law is to be carried out, but it will not be strained, so as to take from the citizen, without his consent, his individual property and appropriate it to public use, unless there is a plain and manifest purpose in the law to do so. Public interest is the justification for the exercise by the commonwealth of her sovereign right of eminent domain, and even where this right is not disputed, it must be guarded so as to do no injustice to the private citizen. This principle is clearly stated in 1st Shelford on Railways, 57, 2d Shelford, 232 to 235, 268, 576. In giving a construction to this act of 1869, we are not to overlook the fact, that the general railroad law of Feb. 19th, 1849, P. L. 83, fixes the width of a route for a railway, not to exceed sixty feet, except in the neighborhood of deep cuttings, or high embankments, &c., and though the act of 1869 does not profess upon its face to have been passed

as a supplement to the general law, yet as a statute bearing upon the same general subject, in so far as it relates to railroads, it is to be interpreted in connection with, and as a part of the act of 1849. If we treat the act of 1869, as a part of the general law, it is apparent, that it was intended to confer on the companies, additional and enlarged powers; for while in the first instance, the width of the roadway is limited, to a maximum of sixty feet, there is no such restriction imposed by either the letter or the spirit of the subsequent enactment. The act of 1869 can only take effect in any given case, at a time subsequent to the exercise of a power derived from the general law, for until the road has been built, the necessity for widening or straightening cannot arise, a necessity which is to be determined by the board of directors and which cannot be ascertained, until there is a road already in existence, whose lines require to be changed, or its width to be increased.

The affidavits which have been read in resistance to this application for a special injunction, not only do not deny, but in substance admit the truth of the statement in the bill, upon which the second prayer for relief rests; it must therefore be considered as confessed by the defendants that in proposing to take for the use of their road, the route as already surveyed through the land of the plaintiff, Thomas Lodge, they are taking a greater width or breadth of land, than they even claim is required for the immediate wants of the company; more than will suffice for the location and construction of the number of tracks and other works connected with their road, which they propose or intend at this time, to construct or build.

It is, however, expressly stated in the affidavit of the chief engineer of the company, that the road is laid out and located throughout its entire length, of the width of sixty-six feet at grade, which he says is the usual and necessary space required for the construction and accommodation of four tracks; that the company is now engaged in many places along the line, in grading its location of the full width of sixty-six feet, because they believe that the business of the road will be so much increased by the construction of the new line, that four tracks will be required for their proper accommodation. At present it is intended to construct a double track and to lay the additional ones, as they shall be required. The increased space to make up the one hundred and ten feet is needed for embankment or cutting room, fencing and drainage, the road at grade being fifteen feet below the surface at the deepest point, and this, together with other requirements, set forth in the affidavit, is sworn to be an essential want for the construction of a roadway for four tracks through complainant's land, exclusive of land which will be required for the deposit of waste earth.

We are to treat the affidavits of the defendant's agents upon this motion for a special injunction, as establishing all that is contained in them. It is therefore to be taken as proved, that defendants are acting in good faith, and that there is neither malice, nor careless exercise of the discretion, with which the law clothes them, in anything which they have done; and that to carry out their plans successfully and properly, all the land which they claim to appropriate to the use of their road, is to them an actual necessity.

All that remains of the case when this point is reached, is to try and ascertain whether the defendants are exceeding the measure of their authority, in providing for what they believe to be, the present and future wants of their road.

The case stands before us with an undisputed need for two tracks at this time, and with an improved location, which, in the opinion of the directors of the company, will increase business so as to demand enlarged facilities and capacity for the transportation of traffic. This is precisely what is expressed in the act of 1869. Every change of route which is made under this law, is referred to the judgment of the board of directors, and is to be carried into effect, when in their opinion, the same may be necessary. The first step to be taken to meet the requirement for increase of a transportation of traffic, is to secure the requisite amount of land, and the second is to prepare the ground for the laying down of the rails. In every case the future must to some extent be anticipated, an opinion must be formed and a judgment exercised of what may be necessary, and this is entrusted under the law, not to the courts, but to those who are better qualified to pass upon this question, than a tribunal can be which is not conversant with the wants of to-day or the probable demands of the future; nor is an appeal given from the decision of the board of directors to any tribunal of law or equity; when the proper authority has spoken, and said the proposed change "may be necessary" and shall be made, who shall gainsay it? unless, indeed, it be charged that the acts of the board of directors are corruptly or capriciously done, or that the rights of the owners of the land which it is proposed to take, are trifled with, or wantonly disregarded. In such a case relief will be promptly afforded by injunction, because the change of route is not founded on an opinion or belief, that it is or may be necessary for the transportation of traffic, but springs from a motive which places it wholly outside of the protection of the law. There is in this no discretion or judgment, which is all that is authorized by the act of 1869, and which, when honestly and within reasonable bounds, exercised, is not subject to the control of any outside authority. This principle is stated with great clearness by Mr. Justice

Strong, at nisi prius, in the case of *Anspach v. The R. R. Company*, 5 Philada. R. 491. An application to restrain the location of a railroad, which would require the removal of the coal breaker and shute connected with the mine of the plaintiff, and greatly damage him, if it would not entirely destroy his mine, was refused, on the ground that the Legislature had given the location of their road to the president and directors of the company, and not to the courts, who were without power to interfere, unless it appeared that they capriciously or wantonly disregarded the rights of others. And in *Eldridge v. Smith*, 34 Vermont, 484, it was decided that where land is taken for a legitimate purpose, the decision of the locating officers of the company is conclusive as to the extent required, unless the quantity taken clearly exceed any just necessity.

The same principle is asserted in *N. Wisconsin Railroad Company v. Goth*, 25 Wisconsin (4 Jones), 440; *Stockton and Darlington R. R. v. Brown*, 9 House of Lords, 245; *Land v. Medland R. R.*, 3 L. J. Cha. 276. It has also been held by the Supreme Court of this State, in *N. Y. & E. R. R. v. Young*, 9 Casey, 175, that where the power is given to a company to locate their road, they are entitled to execute such power, subject only to the liability imposed on them by law, for the damages thereby occasioned, and that it was error to leave it as a question of fact to a jury, to find whether the injury to property could have been avoided by a change of site for the road. The company alone were entrusted with the right of location, subject to their obligation to pay all damages sustained by the owners of property taken or injured. In principle this case is in entire agreement with *Anspach v. The R. R. Company* above referred to. 2d R. W. Cases, 763 and 8 Rich. Eq. R. S. C. 46 were cited to the point, that equity enjoins until the right is tried at law. The latter case does not decide whether the trial shall be by the court, or before a jury. Our own cases, by which we are to be governed, maintain that it would be error to submit a question of this kind to a jury. 9 Casey, 175.

The cases of the *Cleveland & Pittsburg R. R. v. Spear*, 6 P. F. S. 326, and *Brocket v. O. & P. R. R. Company*, 2 H. 241, assert in the clearest terms the right of a company to execute a power granted in such a way as to them shall seem best; upon which no restriction can be placed, when acting within the limits of their authority, and from no improper or oppressive purpose.

In the application of the Messrs. Lodge to restrain the defendants, wrongful motive is not charged. All that is stated is, that more land is appropriated than is required at this time, to meet the demands of the company for transportation over their road, but the company assert in reply, that all that is em-

braced within the lines of the surveyed route, is taken in good faith, and because they believe the same will be needed for legitimate purposes, connected with their road, and that in executing a grant of authority, under the act of 1869, they can do no less than that which they now propose to do, in justice to the interests which they represent; that the power to change the route of their road, once exercised, is an exhausted power, and that all the land deemed by them to be necessary to provide proper facilities for transportation, must be condemned now, as it cannot be taken by a future widening of the track for a roadway.

The act of 1869 is based on a legislative assumption, that under the power to construct or build a road, after it is completed, there can be no additional construction upon ground not in the first instance appropriated; and, therefore, the need for legislation to authorize the widening and straightening of a road. The strict construction which is always given to a grant of corporate power, is applicable in its full force, to the exercise of the right of eminent domain, and in accordance with this principle it has frequently been held, that the compulsory power of taking land, expires with the period for completing a road, prescribed in the charter. *Pearcy v. Calais R. R. Co.*, 30 Maine 498; 1 Amer. R. W. Cases, 147, and note at page 157; *Shelford on Railways*, Vol. 2. 539; *Moorehead v. Little Miami R. R.*, 17 Ohio, 340; and *Blackmare v. Glamorganshire Canal Company*, 1 M. & K. 154. A contrary doctrine is maintained as an *obiter dictum* in the case of *Chicago R. R. v. Wilson*, 17 Ill. 133, and in the case of the *P. W. & B. R. R. v. Williams*, 4 P. F. S. 103, it was held that an authority to construct a road with warehouses, and all works and appendages for the convenience of said road, "as soon as they conveniently can," gave the right to construct sidings, turnouts, &c., as the same should from time to time become necessary. *Black v. The P. & Read. R. R.*, 8 P. F. S. 249, holds the same doctrine. The last two cases do not by any means cover the ground gratuitously asserted but not involved in the questions before the court, in 17 Ill., which seems to stand by itself in asserting the broad principle, that a general power to take land for the construction of a roadway, may be exercised after the first appropriation, whenever the necessities of the company require it to be done. The weight of authority is certainly against the doctrine maintained in that case; and that weight of authority is much more in accordance with the conservative restraint which the law in general places upon a grant of corporate power. With this interpretation of the law we agree, and as the defendants stand before us exercising in good faith a right which we believe is given to them by the law of 1869,

and that in so doing they are not exceeding the power which the act confers on them, we must refuse the injunction prayed for.

We may also remark in brief :

That Abel Lodge, as tenant, having by his attorney accepted the bond of the company, as a security for his damages, is not entitled to equitable relief by special injunction, even if otherwise entitled to it.

That the right of the company to appropriate additional land on which to deposit the waste earth, is a clear and manifest right.

That the right of Thomas Lodge, to ample security before his land is taken, cannot be disputed, and in the enforcement of this right, he will be protected, if necessity for such protection be shown.

Geo. L. Crawford and J. B. Townsend, Esqs., for plaintiffs.

J. E. Gowen, Esq., for defendants.

[*Legal Gazette*, March 31, 1871, Vol. 3, p. 97.]

Court of Common Pleas, Philadelphia County.

IN EQUITY.

NECE v. PRUDEN et al.

1. Where a cause in equity has proceeded so far that the master has made a report adverse to the plaintiff "that the bill be dismissed with costs," the court will not refer it back to the examiner to retake the testimony of a witness already examined, or to take that of additional witnesses, unless in a clear case of mistake.
2. Particularly they will not refer it back to take the testimony of one of the plaintiffs, when the defendant had, at the hearing, requested it to be taken, and it had then been refused.

Opinion by ALLISON, P. J. Delivered March 18th, 1871.

The bill of Anna N. Nece and Jesse Nece, her husband, v. Condit Prudeo and Charles Scott, was filed as of June Term, 1869, No. 29, and remained before the examiner and the master, until February 7th, 1871, at which time the master concluded his report, finding that the bill is unsupported by law or fact, and that it, therefore, must be dismissed with costs.

The application before us, at this time, is made by the plaintiff, Mrs. Nece, to refer the report back to the master, with leave to plaintiff to take further testimony, to examine in chief Jesse Nece, her husband, and Frank Nece, and to re-examine Jno. D. Hedden, a witness called by the plaintiff, whose testimony, taken at considerable length, was before the master, and was considered by him in making up his report.

Applications, like to the present one, are not to be favored. Courts of equity are always desirous that the examination of witnesses should be completed as much as possible *uno actu*; and that whenever it can be accomplished, no opportunity

should be afforded after a witness has once signed his deposition, "and turned his back on the examiner" of tampering with him, and inducing him to retract, or contradict or explain away what he has stated in his first examination. 2 Daniel's Cha. Prac. 1150, and authorities there cited; Brightley's Equity, 560; Adams' Equity, 372. To this wholesome rule, there are recognized exceptions. If justice requires that a second examination of the same witness should take place, an order will be made to permit it. But under the English practice, this in general will only be allowed after publication of the closing of testimony, or while the cause is before the master; an omission or mistake may thus be corrected at the proper time, but even this is always guarded with the greatest care; the examination is upon interrogatories, and thus it can be first seen, that no undue advantage is taken under such an order; that new matter is not improperly thrust into the cause; and that surprise is not sprung on the opposite party. This doctrine has been carried to the extent of allowing the cause, when being heard before the court, to stand over to enable a party to make an application for permission to re-examine a witness, where a defect in the evidence has not been discovered before, or where the court had prevented a party from reading a document which had been stated in the bill, and admitted by the answer. Jac. 337. In *Denton v. Jackson*, 1 Johnson Chan. 526, after publication passed, and the cause set down for hearing, the deposition of a witness was allowed to be amended, on examination of the witness by the court, he being aged and deaf, and a mistake having been made by the examiner in taking down his testimony. In *Bishop v. Church*, 2 Ves. 100, it was stated by Lord Hardwicke, that the court had sometimes directed a witness to attend personally, where there was a doubt in the mind of the chancellor upon a particular point.

But where an application, like the one before us, is to re-examine a witness, much more when the request goes to the length of calling new witnesses, the court will examine very strictly into the circumstances of the case, and if upon examination it is not satisfied, that the error has been wholly accidental, or the effect of mistake, or omission on the part of the witness, or of the examiner, the application will be refused. *Ingram v. Mitchell*, 5 Ves. 299. In this case the application of the plaintiff is founded upon her affidavit, supported by the affidavit of J. D. Hedden. Neither of the affiants say that Mr. Hedden made any mistake in his testimony, or that he did not say exactly that which was taken down by the examiner, but that the language is somewhat ambiguous, and that the meaning placed by the master upon Hedden's testimony was not the meaning of the witness. The answer referred to is clear and

explicit, and as it stands is free from all ambiguity; if the master has done injustice to the witness, and distorted his evidence, that will come fairly up, upon exception to the finding of the master, we see no sufficient reason for granting this part of the plaintiff's request, and therefore refuse this portion of the application.

As to the request to be allowed to examine Jesse Nece and Frank Nece, as witnesses on behalf of the plaintiff, it is sufficient to say, that the proper ground has not been laid for the introduction of new testimony at this stage of the cause. It is not pretended that every additional fact which it is now stated can be proved by these witnesses was known to the plaintiff, when the case was before the examiner and the master, and that the plaintiff with full knowledge waited until the decision of the master was made known to her, before making this application. In no proper sense does it appear that this evidence is after-discovered evidence. The master in his report says of Jesse Nece: "strange to say, this gentleman, who was the sole agent in and knew all about these transactions, sat through all the numerous meetings before the examiner without vouchsafing a solution or explanation of the mystery." Upon the argument it was asserted, and not denied, that defendant's counsel repeatedly requested the plaintiff to call this witness, who, as the husband of Mrs. Nece and as partner of the defendants, ought to have been able to shed some light upon the questions in dispute. To this request the plaintiff turned a deaf ear, and now that the decision of the master is adverse to her, she asks that she may be allowed to do that which she declined to do, when the call was made upon her by the defendant, Pruden. To grant her request would be to favor experimenting in a proceeding where the utmost good faith should be observed. It would enable the plaintiff to play a double part, having taken the chance of a decision by the master in her favor, and would thus give to her an unfair advantage over the defendants. And as we have already shown, it is against the policy of the law, to afford to one party an opportunity to secure a material change in the testimony of his witnesses, whereby a former statement may be retracted or explained away to meet the exigencies of his cause, or to make for himself a new case by the introduction of testimony purposely withheld in the first instance. Upon such a procedure the law frowns, because it is contrary to equity and justice to permit it; and as Mrs. Nece has shown no good reason in support of this application, we refuse her request.

Geo. Bull and R. P. Dechert, Esqs., for plaintiff.

Thos. J. Clayton, Esq., for defendants.

[Legal Gazette, Mar. 24, 1871, Vol. 3, p. 94.]

Court of Quarter Sessions, Philadelphia County.

WHITE v. THE CITY OF PHILADELPHIA.

1. The acts of Congress providing for the removal to the Circuit Court of the United States, of suits in State Courts between citizens of different States, does not apply to a case wherein a citizen of New York, an owner of land within the limits of Fairmount Park, asks for damages for the taking of such land by the park commissioners.
2. By act of Assembly the title to the land was vested in the City of Philadelphia, and the owner is only entitled to demand from the city the payment to him of his damages. The claim is against the city, not against the park commissioners.
3. Although the park commission have asked the appointment of a jury of view to assess the damages caused by such taking, it is doubtful whether the owner is a defendant, technically speaking, in the proceeding.

Opinion by PAXSON, J. Delivered March 25th, 1871.

On the 18th day of June last, Alexander M. White presented his petition in this court, setting forth that he is a resident of the State of New York, and is the owner of certain land within the boundaries of Fairmount Park, as now defined by the act of Assembly of this Commonwealth, entitled "An act appropriating ground for public purposes in the city of Philadelphia," approved the 26th day of March, A. D. 1867, and the several supplements thereto; that under and by virtue of said act of Assembly and its supplements, the commissioners of said park filed their petition on the 2d day of June, A. D. 1869, for the appointment of a jury to ascertain the value of the said White's property; that no action has been taken upon said petition, and that the matter in dispute exceeds the sum and value of five hundred dollars, exclusive of costs. Whereupon the said White prays that the said proceedings may be removed into the Circuit Court of the United States, and tenders the security usual in such cases.

The act of Congress of September 24th, 1789, Br Dig. 128, provides that "if a suit be commenced in any State court against any alien, or by a citizen of the State in which the suit is brought against a citizen of another State, and the matter in dispute exceeds the sum or value of \$500, exclusive of costs, to be made to appear to the satisfaction of the court; and the defendant shall, at the time of entering his appearance in such State court, file a petition for the removal of the cause for trial into the next Circuit Court * * * and offer good and sufficient security for his entering in such court, on the first day of its session, copies of said process *against him*, and also for his there appearing * * * it shall be the duty of the State court to accept the surety and proceed no further in the cause." This was followed by the act of the 14th of July, 1866, Supp. to Bright. 114, which enacts that, "If in any suit already commenced, or that may hereafter be commenced in any State court

against an alien, or by a citizen of the State in which the suit is brought against a citizen of another State, and the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the court, a citizen of the State in which the suit is brought is or shall be a defendant, and if the suit, so far as relates to the alien defendant, or to the defendant who is the citizen of a State other than that in which the suit is brought, is or has been instituted or prosecuted for the purpose of restraining or enjoining him, or if the suit is one in which there can be a final determination of controversy, so far as it concerns him, without the presence of the other defendants as parties in the cause, then, and in every such case, the alien defendant, or the defendant who is a citizen of a State other than that in which the suit is brought, may, at any time before the trial or final hearing of the cause, file a petition for the removal of the cause as against him into the next Circuit Court of the United States to be held in the district where the suit is pending, and offer good and sufficient surety for his entering in such court, on the first day of its session, copies of said process *against him*, and of all pleadings, depositions, testimony, and other proceedings in said cause affecting or concerning him, and also for his there appearing and entering special bail in the cause, if special bail was requisite therein; and it shall thereupon be the duty of the State court to accept the surety and proceed no further in the cause as against the defendant so applying for its removal," &c., &c.

By section 2d of article 3d of the Constitution of the United States, the judicial power of the United States is extended to * * * "controversies between citizens of different States."

By act of Congress of September 24th, 1789, ch. 20, § 11, (Brightly, p. 126,) it is provided that "the Circuit Court shall have original cognizance, concurrent with the courts of the several States, of all suits, of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500; and the United States are plaintiffs or petitioners, or an alien is a party, or the suit is between a citizen of the State where the suit is brought and a citizen of another State."

If the petitioner's case comes within the acts of Congress above cited, we have no discretion, but are in terms required to make the order. In *Gordon v. Longert*, 16 Peters, 97, it was held that an application for the removal of a cause from a State court to a Federal court, in a case within the provisions of the act of Congress, is a matter of right, and is not addressed to the mere discretion of the State court. But it is contended by the city that this case does not come within the rule above stated, for the reason, first, that this proceeding is not a suit within

the meaning of the act of Congress, and second, that even if it were, the petitioner is not a defendant in such suit.

It certainly may be questioned whether this is such a proceeding as the act of Congress refers to. The word "suit" in its general sense, is a very comprehensive term, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords him. The modes of proceeding may be various, but if a right is litigated between the parties in a court of justice, the proceeding by which the decision of the court is sought is a suit. *Weston v. The City of Charleston*, 2 Peters, 464. But there is some ground for the assumption that in the act of Congress referred to, the word suit is used in a more restricted sense. It refers to a proceeding in which the defendant is brought into court upon process, and he must enter his appearance thereto at the time of his making an application to the State court for the removal of his cause. In this case there has been no process issued against this petitioner. There is no suit—certainly no technical suit—pending, to which he can enter his appearance. The petition for a jury was filed by the commissioners of Fairmount Park, and the prayer thereof is for the appointment of a jury to assess the damages to which Mr. White may be entitled by reason of the taking of his land for public use. No process issued against him, and he may appear before the jury or not at his discretion.

The proceedings on the part of the park commission are in the nature of the selection of a tribunal before which the city and Mr. White may appear and settle the question of damages, rather than the commencement of a suit by process, directed against this petitioner. But we do not propose to decide this broad question, for the reason that, conceding this to be a suit, the petitioner is in no sense a "defendant" therein. It must be borne in mind that this is not a proceeding to take the petitioner's land. By the act of Assembly of 26th of March, 1867, the title of his land within the limits of what is now Fairmount Park, was vested in the city of Philadelphia, and he has now nothing but a claim against the city for damages by reason of such taking. That claim is against the city—not against the park commissioners. All that the latter have done, as before observed, is to select a tribunal before which the claim of the petitioner may be heard. In any proceedings before that tribunal, if the petitioner appears at all, it must be as plaintiff. He is the claimant. He demands of the city compensation for his land already taken. The city may defend, or resist his claim, and allege either that he has no title, or that he claims more than the land is worth. The onus is upon him, and he must make out his case as in other instances. Bouvier defines a

plaintiff to be "he who complains;" and a defendant as "the person called upon to answer, either at law or in equity." Here, the only person who complains is the petitioner—the only party called upon to answer, is the city.

Most of the cases cited by the learned counsel for the petitioner, refer merely to the jurisdiction of the Circuit Court. In this case the Circuit Court may or may not have jurisdiction. We express no opinion upon that point. But even if it has, it does not necessarily follow that the petitioner is entitled to an order of removal. The act of Congress only authorizes such order in a certain class of cases, of which we do not think this is one.

We decide this case irrespective of the act of Congress of March 2d, 1867. This application was not made under said act, and as the petitioner has not brought himself within its terms, we could make no order of removal thereunder. It is unnecessary for us to express any opinion as to how far said last mentioned statute is applicable to this case.

The order of removal asked for in the petition is refused.

[Legal Gazette, April 7, 1871, Vol. 3, p. 109.]

District Court, Philadelphia County.

CITY OF PHILADELPHIA v. EURISTA et al.

1. On a *sci. fa.* sur claim for taxes, a paper, partly in the nature of a demurrer and partly an affidavit of defence, filed by one who is not a party to the record, will not be regarded.
2. *Sembla.* That under the act of 1867, establishing the registry bureau, no judgment will be given on such a *sci. fa.* where the property is registered; unless the writ is served personally on the registered owner.

Opinion by LYND, J. Delivered April 8th, 1871.

Scire facias, sur claim for taxes; sheriff's return, "made known by posting and publication, and *nihil habent* as to defendants."

No appearance is entered, but F. Scott files a paper, one-half demurrer and one-half affidavit of defence.

We refuse to consider this paper, because it is filed by a person who is not a party to the record, who does not ask to become a party to it, and who does not appear to act on behalf of any such party.

It may be remarked, however, that neither as a demurrer nor as an affidavit of defence could said paper be sustained on the merits.

Inasmuch as we refuse to consider the so-called demurrer,

we cannot give judgment for plaintiff on demurrer; and we cannot grant judgment for want of an affidavit of defence, because there has been no actual service of the writ. *Miner v. Graham*, 12 Harris, 494.

We cannot, however, dismiss this case, without reminding the counsel for the city of the system of legislation establishing the registry bureau. We think that that system was designed to assimilate the proceedings for the collection by suit of municipal claims to the ordinary proceedings by *scire facias* between private parties. Hence the provision of the act of March 27th, 1867, § 1 (P. L. 600). "No property so returned" (i. e., to the registry bureau), "shall be subject to sale for taxes or other municipal claims thereafter to accrue, as a lien of record thereon, except in the name of the owner as returned, and after recovery by suit and *service of the writ upon him, made as in case of a summons.*"

Also the provision of the act of March 14th, 1865, § 5 (P. L. 322), "if the land or house sold" (at private sale,) "be afterwards sold for taxes, thereafter accruing as a lien of record, before said duty (of registering) *shall have been performed*, the purchaser shall acquire title as now he may by law within the county of Philadelphia; but if the said duty of making the return, as required by this act, shall have been discharged by the party, who shall have acquired title, in whatever manner before the tax accrued as a lien of record, for which the same shall have been sold, the purchaser at the tax sale shall not acquire the title of such person, who shall have performed said duty, or of his heirs or assigns, unless the *same shall have been made in the name of such owner*, after service of process upon him, *as in case of suit by summons.*"

This section distinctly recognizes two systems; the old (applicable to unregistered real estate), which respects no personal rights, in the collection of municipal dues; and the new (applicable to registered real estate), which subordinates the *jus ad rem* to the *jus personæ*.

A construction of this legislation, in favor of its obvious design, is demanded alike by the interest of the city and of the citizen.

We incline to the conclusion that, where the record shows a registered owner, no judgment can be rendered, until after service upon him, "made as in case of a summons;" and that the other parties, named as "owners or reputed owners," will be disregarded, or stricken off on motion, or, if preferred by the counsel for the city, judgment against them will be given at the same time that it shall be given against the registered owner; a judgment against them prior to that time would be vain, as the act is imperative that "no property so returned

shall be subject to sale, except in the name of the owner as returned," etc.

As a matter of course, not having the question before us, and without the benefit of argument by counsel, we *decide* nothing; what has been said is by way of suggestion to counsel and other officers of the law, charged with the responsibility of suing out such claims, of returning process and of permitting the entry of office judgments thereon.

Demurrer so-called stricken off.

[Legal Gazette, April 14, 1871, Vol. 3, p. 117.]

Circuit Court of the United States, Eastern District of Pennsylvania.

IN EQUITY.

Before Strong, Justice, and McKennan, Cir. J.

PARHAM v. MACHINE CO. et al.

1. The re-issuing of a patent, upon the surrender of one previously issued, is a judicial act on the part of the commissioner of patents, and the validity of the re-issued letters can only be attacked on the ground that a comparison of the specifications of both shows clearly that the latter is for a different invention from the original patent, and that therefore the commissioner exceeded his authority in issuing them.
2. In such a comparison, not only the specifications, but also the drawings and the working models of both patents on file in the patent office must be considered.
3. Nor is it any objection, that in his application for the re-issued letters, the inventor omits to claim part of that for which the original letters were granted; it can do no harm to the public that they should get a part of a new invention free of the inventor's claim.
4. Where an invention is attacked on the ground of want of novelty, the fact that the machines relied on as being prior inventions were in existence for a long term of years, but were never made use of except by way of experiment, and that unfrequently, is a strong circumstance to show that they are not identical with the complainant's invention, which is of practical utility.
5. Where the invention is of a combination to be attached to an existing machine, the inventor must describe it with reasonable certainty, and so that one skilled in the art may be enabled to reproduce it, and it must be capable of operation as he proposes to use it; but it is the combination only that he need claim, and not the other parts of the existing machine, however necessary they may be to make the combination practically valuable.
6. The validity of complainant's patent having been shown, and the defendant's infringement on it, a decree for an injunction and account granted.

Opinion by McKENNAN, Cir. J

The complainant is the grantee in letters patent, dated November 21st, 1854, for an improvement in sewing machines, in pursuance of an application filed August 3d, 1853.

These letters were surrendered and re-issued on the 3d of November, 1863, and on the 20th November, 1868, the re-issued

patent was extended for seven years from the date of its expiration.

Of the re-issued and extended patents the respondents are alleged to be infringers, and the complainant, therefore, in his original and supplemental bills, prays for an injunction against them, and for an account.

The respondents set up three grounds of defence.

First. That the surrender and re-issue of the original letters patent "were not made by reason of, or on account of, any such inadvertency, accident or mistake, as is contemplated by the acts of Congress in that behalf, and that such surrender and re-issue were not in accordance with said acts, but in violation thereof, and for the purpose of modifying the description and claim in the original specification of said letters patent, in a manner, to an extent, and for a purpose contrary to and in violation of the true intent and meaning of said acts in that behalf; and that said re-issued patent is not for the same invention intended to be secured by said original patent."

Second. That the complainant is not the first and original inventor of the improvements claimed by him.

Third. That they have not committed any infringement of the complainant's patent.

I. By the act of Congress of 1836, the commissioner of patents is authorized to accept the surrender of a patent and re-issue it for the residue of its unexpired term, when it shall be inoperative or invalid, by reason of a defective or insufficient description or specification, or by reason of the patentee claiming in his specification, as his own invention, more than he had or shall have a right to claim, as new, if the error has or shall have arisen by inadvertency, accident, or mistake, and without any fraudulent or deceptive intention. The power of accepting the surrender of the original patent and of granting a re-issue of it is here confined exclusively to the commissioner, and is to be exercised judicially by him. The presumption then is, that he has exercised it lawfully, and that the reasons for which alone its exercise could be invoked have been sufficiently shown to exist. As a corollary from this his decision is final, and is to be treated as foreclosing all inquiry into the existence or sufficiency of the facts, which are prescribed as necessary to authorize him to grant a re-issue. Fraud even will not warrant a re-examination of his decision, at the instance of an alleged infringer. *Railroad v. Stimpson*, 14 Pet. 458; *Stimpson v. Railroad*, 4 How. 484; *Rubber Co. v. Goodyear*, 9 Wall. 797. In *Seymour v. Osborne*, 10 Wall., Mr. Justice Clifford delivering the opinion of the court says: "When the commissioner accepts a surrender of an original patent and grants a new patent, his decision in the premises, in a suit for infringement, is final and conclusive,

and is not re-examinable in such suit in the Circuit Court, unless it is apparent upon the face of the patent that he has exceeded his authority, that there is such a repugnancy between the old and the new patents, that it must be held, as matter of legal construction, that the new patent is not for the same invention as that embraced and secured in the original patent." *Battin v. Taggart*, 17 How. 83; *O'Reilly v. Morse*, 15 How. 111, 112; *Allen v. Blunt*, 3 Story, 744.

The only ground then on which the allowance of a re-issued patent is open to objection is, that the commissioner has exceeded his authority, in granting a re-issue for an invention different from the one embraced in the original patent. If both are for the same invention, the decision of the commissioner is unimpeachable, and the re-issued patent, with the new specification and description, is to be substituted for the old as the evidence of the patentee's title and of the nature and object of his invention. Differences in the description and claims of the old and new specifications are not the tests of substantial diversity, but the description may be varied, and the claim restricted or enlarged, provided the identity of the subject matter of the original patent is preserved. Within this range, whatever change is required to protect and effectuate the invention is allowable. *Battin v. Taggart*, 17 How. 84. Nor is the alleged discrepancy to be determined by a reference exclusively to the two specifications; the drawings and model filed with the original specification are also proper subjects of consideration, and are often of decisive weight. *Seymour v. Osborne*, 10 Wall.

Testing the patents here by these principles, we are then to inquire what the patentee's invention is.

It is generally described as "an improvement in sewing machines." In the specification attached to the original letters patent, it is stated to consist "in the shuttle carrier and driver, constructed substantially as shown and described, and forming the bearing or seat of the shuttle, during its travel, as well as the guide for it on that side coming in contact with the thread loop formed by the needle, and freely admitting of the passage of the shuttle through the loop when the said carrier is arranged and combined for operation, together with the needle and with the guide plate or its equivalent in the needle side of the shuttle essentially as set forth, whereby the shuttle is relieved from all friction or rubbing, bearing on its thread side of the loop, the thread is prevented from being soiled or injured by lubricating material, and increased freedom of action is given to the shuttle as specified." There may be a lack of methodical exactness in this statement of the patentee's invention—although this was a matter for conclusive adjudication by the commissioner—but it is sufficiently definite to indicate his intention to

claim, first a shuttle carrier or driver, so constructed as to perform specific functions, and second, this shuttle carrier, a needle, a shuttle, and a guide or face plate, combined so as to accomplish the described effects. This is more clearly illustrated by the mechanism of the complete machine, filed with the original application in 1853. We there find a shuttle carrier constructed to perform the functions of supporting the shuttle and of carrying it backward and forward with the vibrations of the carrier, and with a peculiar conformation of the surface on which the shuttle is borne, to wit, a bevel or inclination of it towards the face plate, by which a gentle impact of the shuttle upon the face plate is caused; a face plate with a vertical groove, in which the needle passes, but without any transverse race or groove, to serve as a support for the shuttle, or a guide for the carrier; and a shuttle adapted to the conformation of its seat. Here there are distinctly shown the constituents of the patentee's alleged invention—the mechanical device, claimed by him as new, and its combination with other elements, constructed and arranged to produce new and useful results.

In the amended specification, upon which the re-issue is founded, the patentee's invention is claimed to consist,

“Firstly, in so forming and constructing the shuttle-driver of a lock-stitch sewing machine, that while it performs the required duty of driving the shuttle, it serves to maintain the latter in the desired proximity to the guide-plate, as described hereafter.

“Secondly, in the combination of a driver, shuttle and stationary guide-plate, the whole being formed and arranged substantially as described, so as to retain the shuttle in its proper position during its flight.”

This comparative reference to the old and new specifications is all that is needed to show that the subject matter of both is the same invention—the same mechanism and combination of mechanical devices, indicated in the “original specification, drawings and patent office model,” are described in the amended specification; and like functions are attributed to, and the same effects are claimed for both. The amended specification has the merit of greater conciseness and precision in the description of the invention, and in the methodical and separate definition of the patentee's claims. An amendment of such a character is within the statutory warrant, and has the sanction of express adjudication. In *Carver v. The Braintree Manufacturing Company*, 2 Story, 438, it is held “that a specification may be defective not only in omitting to give a full description of the mode of constructing a machine, but also in omitting to describe fully in the claim the nature and extent and character of the invention itself. Indeed, this lat-

ter is the common defect, for which most renewed patents are granted." And in *Woodworth v. Hall*, 1 Woodb. & Minot, 248, Mr. Justice Woodbury says, "the amendment is not because the former patent was void, as seems to be the argument, but was defective or doubtful in some particular, which it was expedient to make more clear. But it is still a patent for the same invention."

It is true that in the original specification the needle is made an element of the combination claimed by the patentee, and that it is no part of the combination described in the second claim of the amended specification. But this omission constitutes no tenable objection to the re-issued patent, for the reason stated by Judge Story in *Carver v. The Braintree Manufacturing Company*, supra, "that an inventor is always at liberty, in a renewed patent, to omit a part of his original invention, if he deems it expedient, and to retain that part only of his original invention which he deems fit to retain. No harm is done to the public by giving up a part of what he has actually invented, for the public may then use it; and there is nothing in the policy or terms of the patent act which prohibits such restriction." *Battin v. Tuggert*, supra.

As both patents here were for the same invention, the modification of the description and claims of the original patent does not affect the validity of the re-issued patent.

In this connection it is proper to consider the argument touching the construction of the first claim of the re-issued patent. The counsel for the respondents insisted that it is to be interpreted as a claim for the abstract functions, of the shuttle carrier, and therefore void, or that it is to be treated as only a duplication of the second claim, in which the combination, consisting partly of the carrier, is described.

Undeniably, the mere function of a machine is not a patentable subject; but it is just as clear that a mechanical device, adapted to perform specific functions, is, whether its operative efficiency depends upon its combination with other mechanism or not. The novelty and utility of such device are the tests of its patentable merit. Its possession of these qualities entitles its inventor to the protection of the patent laws, and this can be as effectually secured by making it the subject of a separate claim in a patent for an auxiliary combination also, as by making it the sole subject of a distinct patent. 11 How 587; 4 McLean, 180; 3 Wheat. 517, 518. If the complainant, then, was the inventor of a shuttle carrier, which, by its form, or any other mechanical adaptation, is productive of a useful result, he might embody a separate claim for it in his specification, along with another claim for a combination, of which it is an element. Has he done so? We think this can be plainly shown. The

specific functions of the carrier are, first, to furnish a bearing surface upon which the shuttle is to be supported and carried or driven along with it in its flight, and second, to keep the shuttle in proper proximity to the face plate. How are these functions to be effectuated? Obviously by the mechanical form and construction of the carrier. Now is not this what the claim precisely indicates? It is not to be read, "I claim, as my invention, the functions for my carrier of driving the shuttle and maintaining it in the desired proximity to the face plate," as it ought to be, if the functions in the abstract are claimed. But it is to read, in its own words, as a claim for so "forming and constructing a shuttle driver," that it will perform the functions specified. The form and construction of the driver are the gravamen of the claim. Rendered with reference to the whole specification and the patent office model, it imparts a claim for a shuttle driver constructed with a surface upon which the shuttle rests, and is carried with the driver in its oscillation, and formed with a bevel in this surface, whereby the shuttle by its own weight or gravity is caused to impinge upon the face plate.

In *Winans v. Denmead*, 18 How. 330, a patent for a railroad coal car was sustained, whose distinctive patentable quality was its conical form, the effect of which was to equalize the pressure of the load, &c. Mr. Justice Curtis, in delivering the opinion of the court, says, "patentable improvements in machinery are almost always made by changing some one or more forms, of one or more parts, and thereby introducing some mechanical principle or mode of action not previously existing in the machine, and so securing a new or improved result." So here, if the shuttle carrier was distinguished only by the conformation of the shuttle seat, the complainant would be entitled to a patent for it, and the first claim in the specification would be well supported by it.

II. As to novelty.

The complainant's invention is alleged to have been anticipated by several similar inventions, but as the machines devised by E. D. Leavitt and John P. Emswiler were chiefly relied upon in the argument to show this, it is only necessary to notice them. They are three in number, and are respectively designated as the Fisher, the Fisher-Wickersham, and the Emswiler machines.

The proofs in the case very clearly show that Parham's invention was perfected about the beginning of the year 1852, and that, for a considerable period before that, he was engaged in getting up his plans. From working drawings then furnished by him, sewing machines embodying his improvement were constructed, the identity of some of which has been

traced down to the hearing; and they were in successful and steady use for many years. The completeness and practical utility of his invention are thus demonstrated. Of these facts there is ample and uncontradicted proof, and in the face of it we cannot, on a mere argumentative trial of his invention, adjudge it to be inoperative and valueless.

The Fisher machine (Exhibit No. 1), was made by Fisher in the early part of 1850, and was the model from which the Fisher-Wickersham machine (Exhibit No. 2) was constructed by Wickersham in the latter part of the same year. They are substantially the same in the principle of their operation, the only notable difference between them consisting in this, that in the first the movement of the shuttle is in the arc of a circle, and in the latter in a horizontal line.

Their history is somewhat extraordinary. The first one was made by Fisher, and he never saw it in practical operation. It was made for E. D. Leavitt, and the only use he knew or "thought" was made of it is stated in his answer to the thirty-eighth cross-interrogatory propounded to him—"I think samples were sewed by it, enough to show the working of the principle; but very little." It was delivered to Wickersham, as a model for a duplicate, and remained in his shop at the Mechanic Mills, at Lowell, until 1857, when it was disentombed from the attic of that establishment, and carried to Boston to Martin and Rufus Leavitt, by whom it had been purchased. To them it belonged when the proofs were taken. At no time during all this period, was it employed in any operative use, except as stated by E. D. Leavitt.

The Fisher-Wickersham machine was delivered to E. D. Leavitt in October, 1850, and he sewed with it a pair of pants and a jacket for a small boy, and a pair of pants for a larger boy. It was kept most of the time until April, 1857, in a small room up stairs in his house, when it also was sold to Martin and Rufus Leavitt for \$200, but no use was made of it during this time, not even by Leavitt's wife in making clothing for their children. When the Leavitts got it, it was boxed up and only taken out to be used in a law suit in Baltimore, after which it was returned to the box and remained there until it was reproduced in this case.

Now what was the operative merit of these machines in the estimation of their inventor, makers, and various owners, as indicated by their conduct, rather than by the less reliable guide of their opinions? At the time when they were made the country had learned the great value of the sewing machine, and inventive skill was stimulated to devise improvements in its mechanism, by which its effectiveness might be increased and popular favor attracted. Is it then within the range of

probability, that the proprietors of an invention, from which, if successful, large profits might flow, would so soon have cast it aside, if the trial to which it was subjected had proved its practical utility? No further effort was made to test its merit, no patent was applied for, and it was only rescued from entire oblivion for a reason in nowise importing its capability of successful and useful operation. While, therefore, there has been no satisfactory trial of the efficiency of these machines, and the persons interested in them, have thus indicated so decided a judgment against their practical utility, we but enforce a logical sequence in assigning them to the category of unsuccessful and abandoned experiments.

But while these machines were thus thrown into disuse, they were carefully preserved by Martin and Rufus Leavitt, on account of their supposed effectiveness, as evidence to protect the infringement of analogous inventions. This is the only value the Leavitts attached to them, and so they were kept from 1857, until they were used in a suit at Baltimore, and now again in this case. How far they are available for that purpose here, we are now for a moment to consider.

In reference to what are called "race machines," in which the shuttle is carried and rests in a grooved channel, it is only necessary to say, that they are manifestly essentially different from Parham's.

In Parham's machine are found a vertical face plate, with no groove for a tongue in the shuttle to move in, a tongueless shuttle sliding in contact with it, supported on the under side by the surface on which it rests and by which it is carried backward and forward, this bearing surface and the under surface of the shuttle having corresponding bevels. These elements are not embodied in the Fisher machines, as the respondent's expert, Wickersham, testifies, and is plainly shown by an inspection of the machines themselves. Herein then are important mechanical differences between them; but when the functions to be performed and the effects sought to be accomplished by this mechanism are considered, these differences are shown to be substantial.

It is essential to the operative efficiency of a lock-stitch sewing machine that the shuttle should be so adjusted to the face plate, that it will pass through the loop in the needle thread, and thus, by the engagement of its thread with the loop, the lock-stitch be formed. This effect is produced in Parham's machine by the bevelled form of the upper surface of the carrier and the under surface of the shuttle, and this, co-operating with the weight or gravity of the shuttle, keeps it in the desired contact with the face plate, along the grooveless surface of which the shuttle is guided.

While the carrier then performs the functions of supporting and carrying the shuttle along with it, its peculiar conformation and its combination with the shuttle and face plate, produce these effects, viz.: the necessary impact of the shuttle on the face plate, the retention of the shuttle in its proper lateral position during its flight, the reduction of the friction of the shuttle upon the face plate, and the avoidance of lubrication by which the thread is soiled.

Now it seems clear to us that these effects, all of which are useful results, even if they are conceded to be produced by the Fisher machines, are accomplished by different mechanical agencies and in different degrees. Their shuttle carrier is constructed with two upright elastic arms, from the inner face of the top of which two pins project, which are inserted in corresponding holes made in the back of the shuttle. Upon these pins the shuttle is supported, and its contact with the face plate is caused by the pressure of the arms upon its back. Tongues are formed on the needle face and at each end of the shuttle, to move in a transverse groove in the face plate, the function of which "is to keep the point of the shuttle in its proper position on the face plate, as it flies back and forth." The carrier here performs the office of carrying the shuttle with it in its flight, and, at the same time, of supporting it vertically—as is done in Parham's machine—although it is not altogether clear that this latter office is not partly performed by the ledge in one and the transverse grooves in both machines. But here the similitude ceases. Distinct and dissimilar mechanical forces are employed to cause and maintain the contact of the shuttle with the face plate. In the one it is produced by the form of the shuttle seat, co-operating with the gravity of the shuttle; in the others by the elastic pressure of the supporting arms, exerted directly upon the back of the shuttle. In the one the proper position of the shuttle is preserved by the combined form and arrangement of the carrier, shuttle and face plate; in the others by a transverse groove or channel, co-operating with the tongues in the shuttle. In the one only such friction is caused as is due to the mere weight of the shuttle, resting loosely against the face plate; in the others is the superadded pressure of the elastic arms directly upon the shuttle, causing an attrition of it, which is plainly visible upon its needle face. In the one the exposure of the thread to soiling is avoided by a grooveless face plate; in the others it is subjected to the risk of this by the necessity of lubricating the grooves in which the shuttle vibrates. These are notable differences, and they are sufficient, in our judgment, to disprove the identity of these several machines, either in the effects produced by them, or in the principle of their operation.

Like differences, to some extent distinguish the Emswiler

from the Parham machine, although there are more points of resemblance between them. For one who had no practical knowledge of mechanics, and had never seen a sewing machine, as Emswiler says was the case with him, his machine certainly evinces considerable ingenuity, although a patent for it was refused. Its shuttle carrier consists of a single upright elastic arm, to which is attached at the top an oblong bed or cradle, and which is open only on the needle side of it. In this bed the shuttle is confined and rests, and is carried with it in its motion. It has a vertical face plate, without a longitudinal groove. The shuttle carrier here performs the functions of supporting and driving the shuttle, and of placing and maintaining it in contact with the face plate. But the agency employed to produce and preserve this contact is as different from Parham's, as in the Fisher machines. In Parham's machine, as already said, it is caused by the form of the shuttle seat, co-operating with the weight of the shuttle; in the Emswiler, by the direct and continuous pressure of the carrier's arm and the shuttle bed upon the shuttle and face plate. That the friction is greater, where the shuttle bed and shuttle are thus pressed and held against the face plate, than where the shuttle rests loosely by its own weight against it, is plain. Here then are not only differences in form, affecting the production and value of results obtained, but differences in the forces applied, and in principle of operation.

Wide differences of opinion exist among the expert witnesses as to the practicability of a machine constructed with a shuttle carrier like Emswiler's—the reasons given for these opinions are the proper tests of their comparative weight. Judging them by this standard, the opinion of True, one of complainant's witnesses, is entitled to special consideration. As the contact of the shuttle with the face plate is necessary to make the shuttle take the loop, so there must be sufficient space between the shuttle bed and the shuttle to allow the loop thread to pass freely around the back of the shuttle. No provision is made to secure this contact, except the pressure of the shuttle bed upon the shuttle. One of two results then would follow, either the shuttle would not engage the loop, if it was not pressed against the face plate, or, if it was, the loop thread could not pass behind the shuttle, and, as stated by True, it would be broken. However that may be, the working value of the machine ought to be shown by satisfactory proof of its successful use. Such is not the character or effect of the evidence produced here. On the contrary, of the machines which Emswiler says he made, like the model exhibited, and sold for use, no trace could be found of any one of them, after diligent search by both parties, aided by the offer of a liberal reward. If they had proved to

be practicable and useful, all knowledge of them would not have been so entirely lost.

But did Emswiler himself treat his machine as practically complete, and its shuttle carrier as anything more than an experiment, when his first model was filed? The distinct import of his correspondence with the patent office is, that he did not. And when he made his final appeal for a patent, it was upon the basis of a new model, showing his abandonment of the movable shuttle carrier, and the substitution for it of a race. This shuttle carrier was not then a determinate feature of his first machine.

The time when Emswiler embodied his ideas in the concrete form of a machine, adapted to actual use, the proofs leave us to fix by indeterminate probabilities. That he was engaged in experiments for several years is sufficiently proved, but that his "speculations had been reduced to practice, and a machine had been produced" by him before 1852, when Parham's invention was complete, would be an unsafe deduction from the testimony of witnesses, whose statements are not consistent, and whose recollection of dates, especially, is necessarily indefinite and unreliable, after the lapse of eighteen years. The evidence must establish clearly the priority of a completed and useful machine over the complainant's, or it is unavailing,—to doubt upon this point is to resolve it in the negative.

III. Are the respondents infringers of the complainant's patent?

If this question were to be answered by the testimony of the witnesses on both sides alone, we would be bound to say that the preponderance of it is against the respondents. For while all the experts examined for the complainant positively affirm it, they are substantially corroborated by several of the respondents' experts.

But an analysis of the disputed parts of the respondents' machine will strengthen this conclusion. They embody a shuttle carrier with a bevel in its surface where the point of the shuttle is intended to rest, constructed to support the shuttle from its under side, and so that it will be carried backward and forward by the surface on which it rests; a shuttle with a corresponding bevel on its under side at its point; and a vertical grooveless face plate. Now these are a counterpart of Parham's invention, and if they were all, there could hardly be a question about infringement. But it is claimed that the mechanism of Parham's and the respondents' machines is unlike in other essential particulars, and it was sought to show this by an argument of much logical ingenuity and acuteness. These features are said to consist,

1. Of a spring attached to the back of the carrier and operating upon the heel of the shuttle.

2. Of an upper clutch on the carrier, just over the top of the point of the shuttle, with its side surface inclining inwardly.

3. Of a latch attached movably to the carrier, and passing over the top of the shuttle and holding it down.

Of these in their order:

First. It is necessary to insure the passage of the shuttle through the loop, that the shuttle at its point should be in contact with the face plate. This is accomplished in Parham's carrier by the bevelled bottom of its bearing surface co-operating with the bevelled bottom of the shuttle. Does the back spring produce this effect, or is it the essential agent in producing it? If it is, the method is not Parham's, because the forces employed are altogether different. The spring operates upon the back end of the shuttle and so presses it forward. But in what precise direction? In a line exactly parallel with the face plate. If the surface of the carrier were level, then it is obvious that the pressure of the spring would not cause the shuttle to incline toward the face plate. But the shuttle presses upon the face plate. How, then, is this caused, if not by the spring? By the peculiar bevels of the carrier and the shuttle, and they are, therefore, the instrumental forces in producing the specific result. The spring then does not perform the function, which the bevelled form of Parham's carrier is adapted to effectuate. It is not a substitute for the bevel, and so its employment does not discriminate the means used by the respondents, from those used by Parham, to produce the effect aimed at by both.

The fundamental infirmity of the argument is in assuming that Parham's patent is only for a combination; and this characterizes it throughout. But it has been before shown that this patent embraces a claim for a carrier, adapted by its form and construction to produce a certain *effect*, to wit, the "proximity" of the shuttle to the face plate. It is the essential mechanical *instrumentality* in the production of this *effect*. It is not the co-operative efficiency of the weight of the shuttle—and this is all that the spring is claimed to supply—that constitutes the patentable quality of the carrier; but it is its mechanical adaptation to produce the prescribed effect. As the spring does not furnish the force thus made available, it cannot be regarded as varying the principle of operation.

It is said though, that the spring serves to keep the shuttle in a proper position to make the bevels effective. That may be so, but it is only then auxiliary to the bevels, not essential to their specific efficacy. And if a better result is thus obtained, it is an improvement on Parham's carrier, in substi-

tuting an elastic for a non-elastic back, by which the shuttle is confined and upon which it impinges. But this improvement can give the respondents no right to use what the complainant invented.

These deductions are fully supported by the evidence on both sides.

Singer, a witness for the respondents, describes the spring as keeping "the shuttle in position by holding it forward against the forward part of the carrier, so as to cause the shuttle, owing to the peculiar bevels of the shuttle and the carrier, to press towards the face plate; that is to give the shuttle an inclination towards the face plate"—and that "it acts as a kind of cushion to receive the pressure of the shuttle in drawing in the stitch, which I believe is better than if the shuttle struck solidly against the back of the carrier." He also testifies that the respondents' machines have been used for as long as two months, with the spring inoperative, but that they could not do good work with any certainty in that condition. And such is the substantial import of the testimony of other witnesses of the respondents. Chabot, a witness for the complainant, states the function and effect of the bevels substantially as Singer does, but he goes further and says, that he has worked the respondents' machine with the spring inoperative, and so successfully that he would dispense with it altogether.

The result of this evidence clearly is, that the spring exerts no essential agency in pressing the shuttle upon the face plate, but that this effect is caused by the bevels; and that, at most, the employment of the spring only improves the effectiveness of the bevels.

Second. As before stated, the respondents' carrier has a bevel in its surface just under the point of the shuttle, and a corresponding bevel in the under surface of the shuttle. What were they put there for? We must assume that it was for some practical purpose. Their specific operation is to incline the shuttle toward the face plate. We must therefore conclude that they were intended to perform this function, as the only one appropriately pertaining to them. Now this is the same mechanical adaptation employed by Parham; in other words, it is the same mechanical force used by him, applied in the same way, and to produce the same effect.

But the clutch at the top of the carrier has an incline inwardly in its upper side surface, and the shuttle has a corresponding incline in its surface coming in contact with the carrier. Incline is only another name for bevel; and the avowed design of these bevels is to direct the shuttle toward the face plate. They co-operate with the bevels in the under surface of the carrier and shuttle in performing this function, and they are, there-

fore, only auxiliary to the latter. In the Parham invention, the force of the bevel is applied at the bottom of the shuttle, but as the effect produced is the same, it is immaterial whether the force is applied at the top or the bottom of the shuttle. The identity of the mechanical instrumentalities used, and of the principle of operation, is thereby unaffected.

Third. The second claim in the complainant's specification is for a combination of the driver, shuttle, and face plate, "the whole being formed and arranged substantially as described, so as to retain the shuttle during its flight in its proper position, for the purpose specified." In the body of the specification it is stated, that the shuttle "is confined in front by the plate C; at the back by the driver A; above by the arched plate H; and below by the ledge x of the driver."

It is insisted that by reference to the description, the arched top plate is to be incorporated in the claim as an element of the combination, for the alleged reason that it is necessary to the action of the combination described; and when it is so incorporated, that the respondents are not infringers, because they use a latch instead of a top plate to hold the shuttle down.

The law imposes upon an inventor the duty of describing his invention in such full, clear and exact terms, that any one skilled in the art can make and use it. The reason of this requirement is obvious. It is, that the exact character and purpose of the invention may be understood, and that the public may be enabled to construct and use it, after the expiration of the patent. Hence, where an entire machine is claimed, it is necessary to describe all the parts essential to its practical working and use. But where an addition to an existing machine, which is an improvement merely, is claimed, it is necessary only to describe the elements composing the improvement, with their relations to the other parts of the machine. And this is true of a combination as well as of a single mechanical device. An inventor may define his invention in his claim as he thinks proper, but it must be capable of operation, when reduced to practice, *as he proposes to use it*. If the description clearly indicates the method of its use, and its relations to the other mechanical elements operating with it, a claim for a combination of them is good, although it may not embrace some that are essential to the operative efficiency of the combination. In *Forbush v. Cook*, 2 Fisher, 669, Mr. Justice Curtis thus concisely states the law, "nor is it requisite to include in the claim for a combination, as elements thereof, all parts of the machine which are necessary to its action, save as they may be understood as entering into the mode of combining and arranging the elements of the combination. If inclined wires are necessary to the action of the combination specified, so are many

other parts of the machine, and all parts necessary to the action and combination specified, might be said to enter into the mode of combining and arranging the elements of the combination, but need not be and ought not to be included in the combination claimed."

Certainly a combination to be valid must have the attribute of practical utility, but this is not to be determined by a reference to the abstract practicability of the elements *claimed* to compose it. Resort must be had to the whole specification, and if it is therein properly described, its relations to co-operative mechanism indicated and explained, and the method of its use in connection therewith directed, and, when so used, is practically operative, it is a good combination, and will support a restricted claim for it. All this the complainant has done. He has embodied in his second claim only the three elements before stated. In the body of his specification he has described them particularly, and has fully explained how they are to be used, in connection with other well known parts of the sewing machine, among them the top plate. And, when so used, he has shown that they are practically operative. He has thus fulfilled the prescribed office of the specification, and has demonstrated, by actual and thorough trial, the utility of his invention as claimed. It is true the top plate is necessary to the successful operation of the combination. But it is not more so than is either the eye-pointed needle, the presser foot or the feed wheel. As none of these, however, "enter into the mode of combining and arranging the elements of the combination," but are only auxiliary to its action, no one of them is to be interpolated in the claim and so treated as an essential element of the combination.

The complainant's combination, thus regarded, the respondents are shown to have used, and so they are infringers.

Upon the whole case, we are of opinion,

That the letters patent re-issued to the complainant are valid.

That, so far as appears or is shown in this case, the complainant is the first and original inventor of the improvements described in the first and second claims of said patent.

That the respondents have committed infringement of both said claims.

A decree will, therefore, be entered for an injunction and an account, as prayed for.

The above opinion was concurred in by Mr. Justice Strong.

George Harding, Esq., counsel for complainant.

Theodore Cuyler and Charles B. Collier, Esqs., counsel for defendants.

District Court, Philadelphia County.

KEEN v. THE CITY.

A married woman can only transfer her certificates of city loan by and with her husband; her delivery of such certificates, together with a power of attorney, executed by herself alone, is not sufficient.

Opinion by LYND, J. Delivered April 8th, 1871.

Question reserved—whether a power of attorney by a married woman to transfer certificates of city loan is valid?

The plaintiff does not contend that a married woman could at common law, *contract* to sell or assign her city loan, nor that the act of 1848, and its supplements enlarges her power to contract, except for necessities, but he maintains that, as well before as since these statutes, she could dispose of her property by gift or by contract executed, and that a delivery of city loan certificates with power of attorney to transfer them, is a delivery of the property or value represented by them, and is effectual either as a gift or as a contract of sale executed.

It is a question of capacity. If plaintiff can show that a wife has power to give away her property to a stranger, it will follow that she can make delivery or execute the necessary instruments of writing to pass title.

In practice, no such right is generally recognized; a wife's gifts, like the investments of her separate estate, are made upon consultation with and by her husband.

Neither upon principle can such a right be upheld; for while the law intends that he shall no longer have an absolute dominion over her property, neither shall her dominion be such as to enable her to give away her property, without his knowledge or against his consent. To put away her property in trust, just before marriage, without the knowledge of her intended husband, is a fraud upon him, and will be declared void upon his application. *Duncan's Appeal*, 7 Wr. 67.

Surely the rights of an actual husband are not less than those of an intended one.

But the plaintiff refers to *Hinney v. Phillips*, 14 Wr. 382.

But this case merely establishes the rights of a married woman to give her money or other property to her husband. Those cited in 14 Wright (*Naglee v. Ingersoll*, 7 Barr, 204; *Towers v. Hagner*, 8 Wh. 48; and *McGlinsey's Appeal*, 14 S. & R. 66), are all cases of gifts or loans by the wife to the husband. To these may be added *Burgey's Appeal*, 10 P. F. S. 408; *Johnston v. Johnston*, 7 C. 450; *Grabill v. Moyer*, 9 Wr. 530; *Millinger v. Bausman*, 9 Wr. 522.

Neither upon principle nor authority, therefore, are we able

to declare that a wife can dispose of her property, either by gift or contract, executed to a stranger.

But, again, the plaintiff does not contend that a wife's power of disposal extends to property that does not pass by delivery; and here the difficulty of his case is equally great. A chose in action does not pass by delivery. The title to it always involves a disclosure of the assignor, and an exposure of his or her disability, if any there be; and the debtor is bound to take notice of the invalidity, from such cause, of the title of the so-called assignee.

The certificates of city loan in question are expressed upon their face to be transferable upon the books of the city, at the office of the city treasurer—not merely is an assignment necessary, but an assignment in the special mode prescribed.

The plaintiff with his power of attorney, is in no better condition than if he held a formal assignment under seal of the married woman. The mere delivery to him of the certificate and of the assignment itself would avail nothing—the test of his title would be the validity of the assignment. A want of capacity to make a deed, is not cured by the delivery of it. The bond of a feme sole, though without consideration, would be good after delivery, as a gift of the moneys therein stated; while that of a feme covert, would be valueless though given and delivered upon full consideration. But it is sufficient to state the proposition that that which must be assigned, cannot pass by delivery; it cannot be made plainer by argument.

But it may be asked:

Cannot a married woman sell her city loan or other personal property? Yes! In a very usual and very natural mode, by getting her husband to do it for her—give him the power of attorney. This was doubtless in the minds of the legislators when they provided: "Nor shall such property be sold, conveyed, mortgaged, transferred, or in any manner encumbered by her husband, without her written consent, first had and obtained and duly acknowledged," etc. Act of April 11th, 1848, § 11 (P. L. 536). This, at the same time, restrained his power, but pointed out to her a mode of exercising her right of disposition. If a wife has confidence in her husband, she will have no difficulty in exercising this right; if not, her investments must remain unchanged.

The law does not permit him to act in this behalf without her consent, nor does it permit her to act except in conjunction with him. This is a consequence of marital unity, which legislation has not yet impaired.

Judgment for defendant on the point reserved.

[Legal Gazette, April 21, 1871, Vol. 2, p. 124.]

Supreme Court of Pennsylvania.

AT NISI PRIUS.

PEIPER v. HARMER.

- 1 Under section two of the bankrupt act of 1867, the State courts have concurrent jurisdiction with the Federal courts of actions by the assignee on a cause which accrued to the bankrupt.
2. It is competent for Congress to enact a statute of limitations applicable to such actions, and they have limited them to two years.

Demurrer to plea of the statute of limitations to the third count of the declaration.

Opinion by SHARSWOOD, J. Delivered April 29th, 1871

There is nothing in the second section of the act of Congress of March 2d, 1867, entitled "An act to establish a uniform system of bankruptcy throughout the United States," which precludes a State court from jurisdiction of an action by the assignee on a cause which accrued to the bankrupt. That the Federal courts are vested with such jurisdiction does not make it exclusive. The same provision almost *totidem verbis* is to be found in the eighth section of the bankrupt act of August 19th, 1841; 5 Story, Laws U. S. 2885; and under that act it was held by the Supreme Court of Massachusetts, in *Ward v. Jenkins*, 10 Metcalf, 588, that the State court nevertheless had jurisdiction. I have carefully read the opinion in that case, and refer to it here for the grounds of my judgment on this point.

But in regard to the plea of the statute of limitation it seems to me that it was entirely within the power of Congress in establishing a uniform system of bankruptcy, to provide a uniform rule on the subject of the limitation of actions, whether by or against an assignee in bankruptcy, and such rule must of necessity supersede all State legislation on the subject. If the right of action, asserted by the assignee, is not actually barred at the time of his appointment—a case expressly saved by the proviso—he has two years, and only two years from the time the cause of action accrued, for or against such assignee. This is to apply by the express words of the section to actions brought "in any court whatsoever"—therefore in any court, State or Federal. If the meaning of the act is that the cause of action accrued to or against the assignee at the time of his appointment, as to which it is not necessary that I should here express any opinion, then the effect may be in some cases to prolong, and in others to shorten the period of limitation given by State laws. Thus, if the six years allowed in most actions should be near expiring when the assignee is appointed, then

the time would be extended; if it should only have begun to run, it will be very much shortened. I can understand very well the policy of such a provision as one means of bringing bankrupt estates in the hands of the assignees to a speedy settlement and conclusion.

Judgment for the defendant on the demurrer to the plea of the statute of limitations to the third count.

[Legal Gazette, May 5, 1871, Vol. 3, p. 140]

Court of Common Pleas, Philadelphia County.

IN EQUITY.

CITY OF PHILADELPHIA v. THIRTEENTH AND FIFTEENTH STREETS P. R. CO.

1. Courts of equity will enjoin against the erection of purprestures.
2. A clause in the defendant company's charter giving it authority to run its cars upon any passenger railway now or hereafter incorporated, will not give it any rights on a road the company owning which is alleged to be merged in itself.
3. A general act authorizing the merger of any railroad company into any other railroad company does not apply to passenger railroad companies; such an act is a supplement to the general railroad act of 1849, passed before passenger railways were invented, and applies only to railroads properly so called.

Opinion by ALLISON, P. J. Delivered May 16th, 1871.

The general jurisdiction of courts of equity over cases of purpresture and nuisance is placed beyond dispute by the settled law of England and of the several States of the Union, including the State of Pennsylvania. It is founded on the right to restrain the exercise or execution of that from which irreparable damage to individuals, or great public injury must necessarily arise.

The exercise of this power by courts of equity to restrain encroachments on rights and easements which are held for the use and benefit of the public, is often the only efficient mode of defending the general as well as the individual interests of the citizens in highway and other public accommodations and to prevent the invasion and destruction of those rights. This may be done by final injunction upon bill, answer and proofs where the case is free from all reasonable question, or by special order to await a trial at law in either the civil or criminal tribunals of the land.

But there is no necessity for a trial at law to determine the character of an unauthorized encroachment on, or an illegal appropriation of, a public highway. Such an appropriation of a public street is a nuisance *per se*, and may justly be regarded a purpresture which is both general and special; general,

because it is an attack upon that in which every one has an interest, and special, as to citizens who sustain damages and inconvenience greater than the community at large suffer.

The doctrine is fully sustained in *Eden on Injunc.*, chap. 11, p. 259; 2 *Story's Equity*, 201, sec. 921; *Jeremy's Equ. Juris.*, book 3, c. 2, s. 1. In affirmance of this doctrine are the cases of *Attorney General v. Richards*, 2 *Anstruther*, 603; *Same v. Johnson*, 1 *Wilson*, C. R. 27; *Ambler*, 104, per Lord Hardwicke.

The Chief Baron, delivering the opinion in 2 *Anstruther*, 615, says the prayer of the bill being to abate a nuisance (a wharf erected between high and low water marks), it is argued the court can only consider that question as alone supporting the relief prayed for, and it is contended the court cannot give such a decree, or at least not without a trial by jury. He adds, that may be, where the question is of nuisance and the evidence doubtful; and cites Lord Hale for the principle that where a purpresture and nuisance have been committed a decree to abate it will be granted.

Much stress was laid upon the restriction which is found in the tenth section of the act incorporating the Thirteenth and Fifteenth Streets Company, which enacts that for the purpose of completing their circuit on the route authorized, and on no other route, the said company shall have the right to run their cars upon any other passenger railway now incorporated, or that may be hereafter incorporated in the city of Philadelphia.

This, as we interpret it, does not apply to a case in which there has been a consolidation of the powers and privileges of two corporations, the act in terms providing that all the property, rights, franchises and privileges vested in such company as may be merged, may be transferred to and vested in the company into which such merger shall be made; when this is fully and properly done the two companies become one company, and from the consummation of the union it can no longer be said that in using the route of both corporations and running their cars over it, they are running upon any other passenger railway. The prohibition applied so long as defendant possessed another route than that marked out for it in the act of incorporation; but if in any lawful manner it became possessed of a new and more extended route, the most that can be claimed for the restriction imposed by the tenth section of the charter is that, treating the consolidated companies as one and not as two separate corporations, the prohibition rests on the present body corporate, and there is no violation of the legislative command in running cars upon or over any portion of its present road.

The more radical and vital objection, however, denies to these two railways any lawful authority to unite and merge into one. It plants itself upon the broad ground of a want of

legislative license to consolidate, and argues that the first section of the act of May 16th, 1861, P. L. 702, which confers the power of merger on railroad companies, has no application to passenger railway companies. If this position be well taken, it settles the question conclusively against the defendant, as it has not been pretended that there is any other legislative authority for the act of union, except the recital which is contained in the preamble to the law of April 4th, 1868, entitled an act relating to the Thirteenth and Fifteenth Streets Passenger Railway Company, authorizing the issue of bonds. In this preamble the fact is recited that the two companies have become merged and consolidated, by agreements made in pursuance of the terms of the act of May 16th, 1861, whereby it is stated all the rights, &c., of the Navy Yard, Broad Street, and Fairmount Railway Company became vested in the Thirteenth and Fifteenth streets Company. But it will at once be seen that all that had been done is referred to, and based on the law of May 16th, 1861; whatever virtue that act possessed, the defendants, it is recited in this preamble, took to themselves in aid of their effort to merge. It is an averment of merger under the act of 1861, and nothing more. If that act did not authorize the attempted consolidation, this recital in the preamble to the act of 1861, of a subsisting fact could not make valid that which before was invalid. It hardly needs the authority of a decided case for the principle that a preamble is no part of the law, and that it is only resorted to where the enactment is doubtful, to discover the intention of the law makers. Where that is clear, the preamble can have no controlling influence over the law, and it has in itself no enacting power. It is invoked in case of ambiguity or obscurity, in aid of a sound interpretation of the act; and where not required for this purpose it is of no account what may be contained in the preamble. For this may be cited *Erie and Northeast Railroad Company* 2, Casey, at page 823; *Dwarris on Statutes*, 655; 1 *Watts*, 355.

What, then, is the force of the assertion that the act of May 16th, 1861 has no application to passenger railways? In terms it designated "any railroad company chartered by this commonwealth," as authorized to merge "into any other railroad company so chartered." It covers, therefore, all railroads which derive their corporate powers from this State, and in view of the descriptive term employed to designate the particular kind of road upon which this power of merger is conferred, we are to look to the Legislature itself for an explanation of its meaning. The incorporation by the State of railroads ante-dates by many years the establishment of passenger railways; the statute book is full of acts creating railroads, not only before, but contemporaneous with the charters granted to passenger railways.

First, then, we have legislative action, time and again repeatedly expressed, in the form of laws dealing with the subject of railroads to the exclusion of railways; and at a later date, and upon almost each succeeding year, the two subjects presented clearly to the legislative mind, side by side; and whatever may be said of an occasional confounding of terms, or names, it may be safely averred that a distinction has always been clearly maintained between the two. An act of Assembly which authorizes a company to build a railroad carries with it the idea of the establishment of a road where none had before existed; it means to lay out and construct a roadway, first, by appropriation of land belonging to individual owners, by the exercise of the commonwealth's power of eminent domain to establish grades to which the roadway is made to conform, by excavating and filling, and the building of bridges and other passage ways over ravines and water-courses, and often tunneling hills and mountains. For the use of land thus taken compensation is made by the corporation, and upon a roadway thus constructed or made, a track for the running of locomotives and cars is laid. Two ideas are always associated with such a construction—the absolute or qualified ownership of the railroad by the company, and its use and enjoyment by them to the exclusion of the public except under their direction and control.

The second thought is, the use is either exclusively for the transportation of freight or for carrying freight and passengers in cars drawn by locomotives. There are other incidents connected with a railroad of which we never lose sight, such as the establishment of depots for both passengers and freight, and of stations for various purposes, with a complication of agencies and machinery which are never thought of in connection with a passenger railway. A passenger railway, unlike a railroad, always contemplates a track or railway laid upon a road already established, to the grades of which it must conform, and is always restricted to the metes and bounds of a city or town, or the immediate vicinity, seldom going outside of the limits of a municipality. This is so because it is but a track or way laid upon a street or road which the company do not own, and over which they have no control; and because the purpose is a single one, the transportation of passengers, generally by horse, it is uniformly, perhaps without exception, designated in its corporate title as a passenger railway. And, upon the other hand, no railroad, in the sign or name by which the law of its being says it shall be known and called, ever designates it a railroad.

In addition to the numerous special laws relating to both kinds of companies we have the general railroad law of Feb-

ruary 19th, 1849, by which the mode of organization of railroad corporations is regulated, and their powers, penalties, duties, and liabilities prescribed with great minuteness of detail, not the least important of which are the provisions for taking private property for public use, and the mode of assessment and payment of damages. It requires but a reading of the tenth section of this law to enable any one, lawyer or layman, to ascertain how manifest and broad is the distinction between a railroad with, in some respects, its almost sovereign powers, and the limited authority which is conferred in a charter granted to a passenger railway company. The act of May 18th, 1861, having relation to the same general subject as that to which the extended law of February 19th, 1849, and its supplements apply, and of which they treat, is to be regarded as a part of the general railroad law of the commonwealth, and is to be construed in connection with the legislation which has preceded it upon the same subject matter. It is entitled a law "relating to railroad companies," and speaks of such companies chartered by this commonwealth. In this it is in full accord with the first section of the act of 1869, which reads, "Whenever a special act of the General Assembly shall hereafter be passed, authorizing the incorporation of a company for the construction of a railroad within this commonwealth," etc. This act of 1861, authorizing merger of railroad companies, being regarded, as I think it must be, as a portion of the general railroad law, it has, in my judgment, no relation to, and cannot be made to cover that which is not a railroad—that which is not by legislative corporate title; nor by grant of corresponding corporate powers; and being distinct in its purpose and aim, cannot be treated as a railroad, and as only railroad companies have the right to merge powers, privileges, rights, franchises, and name, the attempted merger of the Navy Yard, Broad Street, and Fairmount Passenger Railway Company into the Thirteenth and Fifteenth Streets Passenger Railway Company is without authority of law to sustain it, and is therefore null and void.

This conclusion renders unnecessary the consideration of the question whether if the act of May 16th, 1861, applied to the passenger railway companies, there has been any lawful merger of the two companies which claim to have effected a corporate union. The decision of the Supreme Court in the case of *Wood, Morrell & Co. v. Bedford, etc., R. R.*, Leg. Int., 1871, page 61, would seem to render it a question not free from grave doubt, both upon the point of a failure of actual connection, and by reason of the road of the Navy Yard, Broad Street and Fairmount Company being only in a small portion of it constructed. The objection is not without force under that decision that the

connection of roads cannot be made by franchise of charters to build roads, but that it contemplates a merger of connecting and completed roads. There are other considerations which are not without importance as to failure of defendant to comply with the ordinances of the city, the effect of the act of Assembly of March 23d, 1866, and the ordinances of councils relating thereto, which might of themselves be sufficient to make clear the right of the plaintiffs to the injunction for which they pray, or to so cloud the title of the defendant as to require that they should for the present, at least, be restrained. And in addition to all this, there is an obligation contained in the twenty-first section of the bill filed by the city, which, standing as it does wholly undenied by the defendant, would be conclusive against the company upon this motion for a special injunction. The allegation is, that in consideration of an agreement of the Thirteenth and Fifteenth Streets Railway Company to abandon all pretended right under the charter of the Navy Yard, Broad and Fifteenth Street Railway Company to build a passenger railway on Broad street, between Christian street and Columbia avenue, the councils granted permission to defendant to lay a track on Spring Garden street, and gave their consent to the removal of the cobble stones from the street. The plaintiff further avers that this ordinance was procured to be passed by the defendant; that the company accepted its provisions, in full satisfaction of all rights or pretended rights to build a railway on Broad street, and that they constructed their tracks in accordance with this permission on Spring Garden street. It would never be tolerated that the company defendant should obtain an advantage by an offer to forego a right to construct a road on Broad street, and after taking to themselves the benefit of their own proposition, go back and resume the right which they had promised to give up.

Motion of the injunction in each case granted upon security being entered in the sum of \$5,000 by the citizens who have appeared as plaintiffs to the suit.

[Legal Gazette, May 19, 1871, Vol. 3, p. 156.]

Supreme Court of Pennsylvania.

AT NISI PRIUS.

CHEW v. EVANS.

Where a power of sale over real estate is given to executors, either to pay debts or for the purposes of distribution among the beneficiaries of the testator, it is a power vested in them *virtute officii*, and as such, on their renunciation or removal, becomes vested in the administrator with the will annexed, under the provisions of the act of 1834.

Opinion by SHARSWOOD, J. Delivered April 29th, 1871.

It is as old as the Year Book, 15 Henry VII. fol. 11, b., that land is not a testamentary matter. Hence, a power relating to real estate given in a will to executors was a mere common law power to them—*nominatim*; it did not therein pass to executors, nor could it be exercised by an administrator *de bonis non cum testamento annexo*. The subject is learnedly and ably investigated by Mr. Justice Cowen, in *Conklin v. Egerton's Administrator*, 21 Wendell, 430. The common law in this respect was changed in this State by the act of Assembly of March 12th, 1800, 3 Smith, 433, which provided that where there was either a devise to executors to be sold, or a naked power to them to sell, it should survive upon the death of one or more, or be exercised by the acting executor in case one or more renounced, or by an administrator *de bonis non*, when all die or renounce. These provisions were all incorporated by the revisers in the act of February 24th, 1834, sections 13, 14, 69, Pamph. L. pp. 75, 86. As to the administrator *de bonis non*, it is expressed thus: "all and singular the provisions of this act relative to the powers, duties and liabilities of executors are hereby extended to administrators with the will annexed." In their report, they declare that for the sake of brevity they have introduced this general provision, placing the administrators with the will annexed on the same footing in every respect with executors. 2 Parke & Johnson, 765. Whether this act of 1800, was or was not supplied and repealed by the act of 1834, it seems very clear and has always been considered that the intention of this legislation was confined to powers given to executors as such *virtute officii*, and did not extend to a power of sale, collateral to or unconnected with their duties as executors. *Ross v. Barclay*, 6 Harris, 179; *Keever v. Schwartz*, 11 Wright, 503; *Waters v. Marqueson*, 10 P. F. Smith, 44. It was held in *Commonwealth v. Forney*, 3 W. & S. 353, that where executors are dismissed and an administrator *de bonis non* with the will annexed is appointed, it is the duty of the court to take a bond with sureties in an amount commensurate with the powers and trust contained in the will. This case was upon a bond given prior to 1832; but by the act of March 29th of that year, section 23, Pamph. L. 195, it was expressly directed that when an executor shall be dismissed, the court shall award new letters to be granted by the register upon such security as the court shall think proper. The ordinary cases of a grant of administration by the register, on the death or renunciation of executors were provided for by the eighteenth and nineteenth sections of that act, without any special direction as to security; that resting on the twenty-seventh section, which declares that in case of any grant of administration, the bonds should have respect to the value of the estate. The eighth section of the act of April

22d, 1856, Pamph. L. 533, first made specific provision that the register in granting letters of administration with the will annexed, should "take adequate security for the faithful accounting for the proceeds of any sales of real estate the administrator may make under such will."

A general power to sell will of course be conclusively presumed to be for the payment of debts; for a purchaser is never required to call for or look into an account, or demand an inventory of personalty or list of debts. Such was the power in *Meredeth's Estate*, 1 Parsons, 433. Mr. Binney's opinion. Hood on Executors, p. 241, note. About the authority of an administrator with the will annexed, in such a case there could be no question. A power also to sell for the purpose of distributing the proceeds amongst persons named or described in the will, is a power which it seems equally clear belongs to the executor, *virtute officii*. This would be the case without any question where there is an absolute direction to sell, and not a mere discretionary power, for in that case, the estate would be converted into money from the death of the testator, but the same rule, as it appears to me, applies where there is only a power. In the case of *Keefer v. Schwartz*, 11 Wright, 503, there was indeed an absolute direction, but it is not rested on this ground in the opinion. Mr. Justice Strong said: "the executors were not made testamentary trustees of the property. They were directed to sell for distribution. Their powers and duties were official by virtue of their office." Some difficulty appears to have arisen in the minds of counsel, from what was evidently merely a dictum of Chief Justice Gibson, in *Ross v. Barclay*, that "no statute of Pennsylvania empowers an administrator, with the will annexed, to execute a trust of land confided to an executor by title or name for any other purpose than to sell for payment of debts," and his declaration in the same case, that a power could not be exercised by such administrator "to turn the land into money for the convenience of partition." This last phrase is repeated in *Waters v. Marqueson*. In both of these cases the trust extended beyond the sale and distribution *virtute officii* to an investment, in short a trust for a collateral purpose. The executors were, in both these cases, testamentary trustees, and they were invested with the power as such. These dicta were, therefore, entirely aside from the case. For myself, I may say, that I copied the phrase from *Ross v. Barclay*, as is often done in the hurry of composition, and it passed without notice in consultation. I may have, and probably had, in my mind not a sale for purposes of distribution, but what is not uncommon in this country, a power to executors to make partition with an ancillary power of sale and conveyance for that purpose.

On the whole it appears that the administrators, with the will annexed of Benjamin Chew, had the same power to sell his land as his executors had, and I am of opinion, therefore, that the plaintiffs are competent to vest in the defendant the title of Benjamin Chew, of Clivedon, to the premises by deed, executed by them in pursuance of the powers in the said will contained.

Judgment for the plaintiffs, for \$5,500.

[Legal Gazette, May 6, 1871, Vol. 3, p. 140.]

Court of Common Pleas, Philadelphia County.

BATTERSON et al. v. THOMPSON et al.

1. The connection between the rector and the congregation of a Protestant Episcopal church can only be dissolved by mutual consent, or by virtue of the provisions in the charter of that church, or by virtue of the canonical laws and ordinances of the church in general.
2. The power of removal is not necessarily incident to the power of appointment, and the vestry which has the first under the charter, must have also some express provision to give them the second.
3. And a motion without a trial on charges duly preferred, of which the accused has notice and duly proven, is void under the canons of the Protestant Episcopal church. *Semble*, that the trial should be by presbyters and diocesan.

Opinion by LUDLOW, J. Delivered May 27th, 1871.

After stating the facts admitted on both sides, the judge set forth three propositions of law to govern the decision. First—What jurisdiction has a civil tribunal? Second—What powers has a vestry *de facto* when acting in compliance with the canon law of the church? And third—Can a rector be dismissed by virtue of the charter of St. Clement's church or the canonical laws of the church? To the first he holds the civil court has jurisdiction; to the second, the court does not express an opinion as to the legality of the election of the vestry on Easter Monday, but decides that they are *de facto* the vestry, and their acts as to third persons are valid. In regard to the third point he said:

We are thus brought to the consideration of the last point to be discussed, and which is not only the most important, but the most difficult one to decide in this case.

Can a rector be discharged, without his consent, by virtue of the charter and by-laws of St. Clement's church, or by virtue of any canonical law or laws whatever, of binding force in the Protestant Episcopal church in the United States, or in the diocese of Pennsylvania, at this time?

We confine our investigation rigidly to the sources of power above enumerated, because we have no right to go beyond them.

If the resolutions of dismissal are to be considered legal, they must be so because sanctioned by the civil or canonical laws specified. All else is *ultra vires*, and beyond the scope of legitimate authority.

Looking now to the charter and by-laws of the church, I find a power vested in the vestry to elect a rector. See Charter, art. 5, By-Laws, art. iii. But upon the question of his dismissal the charter and by-laws are silent.

By the common law, as long ago as *Baggs' Case*, decided in 18th Jas. I., and reported in 11th Co. 99, a., it was determined that the power of a motion did not pass by a grant of the power to elect as incidental to it, but must be expressly reposed in the select body by the charter. It was assumed by Lord Mansfield that it may be transferred to a select body, by a by-law, in the same manner as the right of election. *Wilcock on Corp.* *247, note to sect. 634.

Even if the vestry under *Rex v. Doncaster*, 1 Barnardiston, 265, had the right to make a by-law upon the subject, *none now exists*, and Wilcock very justly observes that in a corporation by charter, surely such a power must be shown to have been expressly granted by charter or a subsequent by-law. If there is no especial provision on the subject in the charter, the power of removal of a member resides in the whole body. 2 Kent, 359. *King v. Mayor and Burg. of Lyne*, 1 Doug. 149, and this last case also decides that if special power be delegated to a part of the body, it must be shown to exist. We think that beyond a doubt the resolutions adopted by the vestry are *per se* null and void, as being beyond the powers delegated by the charter and by-laws.

Here we might pause, and for the purposes of this case found our final order upon the view we take of the power of the vestry, without deciding how far a *congregation*, with the consent of the bishop, may dissolve a connection; but as it is stated that the resolutions have received the concurrence of the ecclesiastical authority of the diocese, I will simply, because the question has been argued, inquire whether, on that account, they are valid; if so, it must be because of some canon of the Protestant Episcopal church in the United States, or of this diocese, or the power which will give validity to this action of the vestry, must be contained in the constitution of the church itself. I have examined the canons of the Church of England for light upon this subject, not because I believe they are of binding effect here, but because as Justice Beasley remarked, "the English ecclesiastical law, although somewhat modified by new circumstances, and by American usages and statutes, constitutes the substantial basis of the law controlling the affairs of this particular church."

These canons, by reason of the peculiar nature of the laws of England upon the subject, give us no assistance, except it may be said, that no case has been discovered wherein any priest has been condemned without a hearing. The constitution of the church, in the United States, after much discussion, extending over a long period of time, from October, 1784, to August, 1789, was at this last date finally consummated, and became the great charter of the church, the universal rule of action, and the bond of a common faith. Hawkes' Eccl. Con. 12. No express power such as is claimed in this case is granted in terms in the constitution; if it exists at all, it must be found in the canons of the church at large, or of this diocese.

The canons of the diocese of Pennsylvania have been examined and are now before me, but these are silent upon the subject; so that the only canon now in existence will be found under tit. ii., canon 4, sect. 1, entitled "of the dissolution of a pastoral connection. The first section declares, "in case a minister who has been regularly instituted or settled in a parish or church, be dismissed by such parish or church, without the concurrence of the ecclesiastical authority of the diocese, the vestry * * * shall have no right of representation in the convention of the diocese, until they have made such satisfaction as the convention may require, but the minister may retain his right to a seat in the convention, subject to the approval of the ecclesiastical authority of the diocese.

"And no minister shall leave his congregation against their will, without the concurrence of the ecclesiastical authority aforesaid; and, if he shall leave his congregation against their will, without such concurrence, he shall not be allowed to take his seat in any convention of this church, or be eligible into any church or parish until he shall have made such satisfaction as the ecclesiastical authority of the diocese shall require."

The second section of this canon provides that a record shall be made of a regular and canonical dissolution, and that a dissolution not regular or canonical shall be submitted to the convention of the diocese.

This canon shall not be obligatory in those dioceses with whose canons, laws, or charters it may interfere.

It will be observed, says, Dr. Hawkes in his work, heretofore cited, page 807, that "this canon applies to nothing but the single case of a desire for separation, which may exist without any other disagreement between the parties."

It may be further declared that no provision is made for the case of a minister who refuses to consent to a dissolution. If a parish or church act without ecclesiastical sanction, or if the minister shall leave without the same, a penalty follows, and may be inflicted; but what is to be done with a church law

which, in a case like the present, prescribes no duty to be performed, creates no offence, and affixes no penalty?

I find under tit. i., canon 2, sec. 1 of discipline, a series of punishable offences. For these a presbyter may be tried, and, on being found guilty, "may be admonished, suspended or degraded."

Is the refusal to consent to a dissolution an offence within the meaning of canon 2, section 1? If so, the minister must be canonically tried. Any other doctrine would expose any presbyter to a virtual suspension or degradation, when and as the officials of the church, ecclesiastical and lay, might determine to strike the blow, and yet lacked either the courage or evidence, or both, to make and sustain a direct charge or accusation.

These remarks are not intended to apply to these defendants, nor to the present most able, eloquent and worthy incumbent of the Episcopal chair; they are intended, however, to test the true meaning of this canon and its legal effect.

If we try the proceedings of the vestry by another standard, we will find their action altogether untenable.

Under and by virtue of a canon in force in this diocese, a presbyter may be tried for certain offences. This canon was doubtless adopted, under the authority of the canon already referred to (see title ii., canon 2, of discipline).

Can it be possible that any minister may be summarily ejected from his parish without a trial?

Shall the civil law guarantee to the humblest citizen a hearing, and may an ordained and duly instituted minister of the Protestant Episcopal church be denied a right as common as this one?

The standing committee of the diocese of New York did not so think, when, in June, 1848, they acted upon a case of this description, *after* a copy of the written application then made, with the facts and reasons upon which it was grounded, had been *served* upon the minister.

The convention of the diocese of New Jersey, as far back as June 6th, 1804, did not think so, when they suspended action, until a canon (now repealed) was passed, to meet Dr. Ogden's case. See Hoffman's Law of the Church, p. 323, n. That venerable prelate, whose name and opinions to this day, even in a civil court, carry with them great weight—I mean Bishop White—did not so believe when in speaking of the canon enacted to meet the above case, he questioned its principle, on the ground that *there should be no severance from a pastoral charge except as the result of a trial for alleged misconduct*. Memoir of the Church, p. 191, supposed to have been written in 1820.

In the "Office of Institution of Ministers," I find in the form of the "letter of institution," which a bishop may by the rubric, send by one of his presbyters, whom he may appoint as the institutor, the following significant sentence: "And in case of any difference between you and your congregation, as to a separation and dissolution of all sacerdotal connection, between you and them, we, your bishop, *with the advice of your presbyters, are to be the ultimate arbiter and judge.*" How, unless by a hearing and trial? At law and in equity, from Baggs' Case to the present hour, no man or men can be condemned against his or their consent without a hearing.

But we must go one step further, and endeavor to prove that without a special agreement, or in the absence of a provision in a church charter, or the by-laws adopted in pursuance thereof, the tenure by which a presbyter in the Protestant Episcopal church holds his rectorship is by no means uncertain.

Special provisions in a charter, or special agreement between the rector and his congregation, become the law of the cases.

In England the tie cannot be broken except by a judicial sentence, or resignation to and acceptance by the ordinary. Burns' Eccl. Law, vol. iii., p. 540.

In the United States conflicting opinions exist among those best able to form a judgment upon the subject.

I am, however, of the opinion that, under the existing laws of the church, the civil contract (except as hereinbefore specified) cannot be broken without an accusation and trial.

This opinion is based in part upon the last legislation of the church; upon the views of more than one of its oldest divines; upon the opinions of men learned in the law, who have examined the subject; upon the attempts which have, from time to time, been made to remedy the difficulty, and upon those general principles which must, in the absence of express authority, govern the case.

In 1804, a canon was adopted, entitled "Differences between ministers and their congregations." A canon on the subject was passed, being 32d of 1808, with an additional clause. This clause was omitted in 1832. Canon xxxiv. of general convention of 1832. This canon provides *a method of trial and a penalty*. In 1847, the committee on canons proposed a new canon, not, I believe, adopted, in which a system of arbitration was created. The original canon was, in 1859, repealed by the general convention, in session in Richmond, Va., on motion of Rev. Dr. Stevens, then a presbyter, and now the bishop of this diocese. (See journal of convention of 1859, pp. 125-127.) An unsuccessful effort was made at this convention to amend the old canon. See journal of convention, p. 88, for the report of committee on canons, by Mr. Hoffman.

The subject, in 1865, was brought before the convention of Ohio by the bishop; and that prelate, in an address, "notices as a sound principle, that where the rights and interests of both minister and congregation are concerned, the body to judge should be composed of clergy and laity."

Bishop White's opinion has already been referred to; while the effort of Mr. Hoffman in the general convention, and the expressed opinion of the late G. M. Wharton, Esq. (a canonical lawyer of acknowledged ability), upon the case which arose in Michigan (see Hoffman's Ecclesiastical Law, page 270), as well as the reported views in the last cited volume of an eminent presbyter of this diocese, Rev. M. A. DeWolfe Howe (whose letter, I regret to say, I have been unable to find), all look in the same direction.

The legislation now repealed, embodied the views of the church upon the subject; the efforts made to amend and to repeal the existing law, both indicated a desire either to perfect the method of trial or to abolish it, and thus make a minister amenable only to canonical discipline; the expressed opinions of prelates, presbyters, conventions, together with the views of prominent laymen, all seem to take it for granted that in some method a trial should take place, and in default thereof the ministerial bond should not be severed. Upon general principles the views already expressed in this opinion upon other points cover the proposition now contended for, while the canon which declares that "a minister is settled for all purposes *here or elsewhere mentioned* in these canons who has been engaged permanently by any parish, according to the rules of said diocese, or for any term not less than one year." Tit. i., canon 13 [2] of Digest of Canons, p. 45, would seem to indicate the sense of the church to be, first, that a settlement should not exist for a shorter term than one year; and secondly, that unless some special agreement or the terms of a charter or by-law prohibit, it may be indefinite.

Having thus considered the facts and law of this case, it becomes my duty to act according to the dictates of my judgment and conscience.

It is very evident that the interests of this corporation are endangered by internal difficulties of which I cannot speak, because I have no judicial knowledge of their nature. Be the causes what they may, it is certain that a house divided against itself cannot stand. I, therefore, officially recommend some amicable adjustment of existing difficulties. Should an intimation to that effect be made, I will at once modify or suspend the operation of the order about to be recorded.

The usefulness of the rector and his assistant will be greatly promoted, and the peace of vestry and parishioners re-established,

should the course suggested be adopted; and this is not an expression of individual opinion (which can have no place here), but of a judge, clothed with the powers of a chancellor, about to exercise a most delicate prerogative, not, indeed, thereby to encourage insubordination, or wilful disregard of ecclesiastical authority, canonically invoked, but only prevent remediless injury.

The first prayer for relief cannot be granted at this stage of this cause, nor will I grant the second prayer in the bill contained, because the injunction would be mandatory.

The plaintiffs, are, however, entitled to relief, as prayed for in the third prayer of the bill, and it is therefore ordered, adjudged and decreed, that the preliminary injunction heretofore granted be continued until the further order of this court, and that the defendants, their agents and servants, be restrained from interfering in any way with the exercise by the Rev. H. G. Batterson of his office of rector, and with the exercise by the Rev. W. H. N. Stewart of his office of assistant minister, in the St. Clement's church, in Philadelphia, until a regular and canonical dissolution of the connection now existing between them and the congregation of said church shall take place in accordance with the constitution and canons of the Protestant Episcopal church in Pennsylvania, and in the United States.

M. Arnold, Jr., W. B. Robins, E. H. Hanson, and Wm. S. Price, Esqs., for the plaintiff.

G. M. Conarro, Geo. W. Biddle, and Edward Olmstead, Esqs., for the defendants.

[Legal Gazette, June 2, 1871, Vol. 3, p. 173.]

Supreme Court of Pennsylvania.

AT NISI PRIUS. IN EQUITY.

THE MISSISSIPPI CENTRAL R. R. Co. v. THE SOUTHERN RAILROAD ASSOCIATION.

Right of party interested under a sealed instrument to use name of covenantor in an action to his use, *Hind v. Holdship*, 3 Watts, 106, disapproved.

Sur rule to stay proceedings.

This was an action of covenant brought in the name of the Mississippi Central Railroad Company to the use of the executors of M. W. Baldwin, deceased, against the Southern Railroad Association. The legal plaintiffs had executed a lease to the defendants of all their property, in consideration whereof the defendants covenanted to pay (*inter alia*) the principal and interest of certain mortgage bonds issued by the plaintiffs, some

of which were held by the parties to whose use the suit was brought. The material language of the covenant is cited in the opinion of the court. To test the right of the equitable plaintiffs to use the name of the covenantees in an action to their use, a rule was entered for the filing of their warrant of attorney. A warrant was accordingly filed and executed by the equitable plaintiffs, whereupon application was made to stay the proceedings.

Opinion by SHARSWOOD, J.

The warrant of attorney filed is not executed by the legal plaintiffs, but by the executors of M. W. Baldwin, deceased, to whose use the suit is marked. It is of course incumbent on them to show that they have a right to use the name of the plaintiffs. If they fail to do so, the proper course is to stay the proceedings. *Meyer v. Littell*, 2 Barr, 177. If a defendant could not thus avert the action, he might be harassed and actually made to pay the money due to a mere stranger or officious intermeddler; for a person to whose use a suit is brought need not show on the trial any right in himself; all that is necessary is to prove the legal plaintiff's right to recover. *Montgomery v. Cook*, 6 Watts, 238; *Hamilton v. Brown*, 6 Harris, 87; *Armstrong v. The City of Lancaster*, 5 Watts, 68. As intimated in the last case, the legal plaintiff or any other claimant may rule the money into court when raised on the execution, and have the question then determined.

But it cannot be that a party can be barred, whether he be the legal or equitable plaintiff, by a proceeding to which he is a stranger.

The defendants then, to protect themselves from a second suit by another person, have a right to demand *in limine* the authority of the alleged beneficial owner to use the name of the legal plaintiff.

This the executors of M. W. Baldwin undertake to show by the copy of the instrument on which the action is brought, which is filed of record. Being a mere copy, it is of course not evidence, but that objection has not been made, and I will consider it as though the original had been produced and proved. It is a lease by the plaintiffs of their railroad to the defendants. One of the covenants contained in it is, that the defendants shall and will pay and discharge the following debts, obligations of the party of the first part (the plaintiffs), when and as the same mature, and on payment being demanded from the parties of the second part, by the person or persons thereto entitled; among others the principal of the second mortgage bonds now outstanding in the hands of third parties * * * * together with all interest maturing or grow-

ing due thereon after the first day of May, 1868. The executors of Mr. Baldwin have also filed copies of interest warrants held by them on their second mortgage bonds, some of which certainly are within the terms of this clause.

As this is a covenant under seal, the action undoubtedly must be in the name of the covenantee, even though it were exclusively for the benefit of a third party, and the consideration moved from him. *Du Balle v. Pennsylvania Insurance Co.*, 4 Wharton, 68. But if it was thus for the benefit of a third party, he would have such an exclusive equitable ownership of the money when recovered, as would entitle him to use the name of the covenantee in an action brought for his benefit. In other words, if the money when received or recovered by the covenantee, would be his—money had and received to his use—then the covenant in equity is his.

It will throw light upon this question to consider whether if this instrument were not under seal, the executors of Mr. Baldwin could sue upon it in their own names. If they could, I think it will not be denied that they can use the name of the covenantee. Upon this point the cases are not easily reconcilable, but I think the better opinion is that they could not. This is not the case of a fund in the hands of a trustee, whether realized in money or to be realized by a conversion of other property into money, and directed by the assignor to be paid over to certain persons, creditors or others. Then the fund is actually impressed with a trust in favor of the persons beneficially entitled. To such a case, *Sharpless v. Welch*, 4 Dall. 279; *Nesmith v. Drum*, 8 W. & S. 9; *Corson v. Craig*, 1 W. C. C. R. 424; *The United States v. Vaughn*, 3 Binney, 400, and *Watson v. Bagaly*, 2 Jones, 167, are applicable and on the principle of *Wilt v. Franklin*, 1 Binney, 502, that acceptance of a benefit is to be presumed, it makes a valid and irrevocable appropriation even against attaching creditors.

But here is no fund realized or to be realized, but an agreement on sufficient consideration to pay money to a third person—that consideration moving from the contracting party and the agreement being for his benefit. In *Hind v. Holdship*, 2 Watts, 106, it was decided that upon such an agreement the third person to whom the money was contracted to be paid could sue in his own name. If that decision is to be regarded as an authority, it determined this point in favor of the beneficial plaintiff.

But though it has never been overruled, and it has been cited and relied on in several subsequent determinations, yet there are other cases which must be distinguished from it or it can not be considered as law.

In that case an assignment for the benefit of creditors being

about to be made, the assignor was desirous of giving a preference to his workmen; the assignee agreed in consideration of the assignment that the hands should be paid at any rate. The plaintiff was one of them—was not present when the promise was made—it was not pretended that the promise was made to him, or that the consideration moved from him. It was not a fund impressed with a trust in his favor; for it could not be pretended that the assignee could set up the payment to him as against the other creditors entitled under the assignment, or do more than stand in his shoes when he had paid him for his *pro rata* with them. It was an independent promise upon an independent consideration. Yet it was held that the plaintiff could sue and recover in his own name. It was then said by Rogers, J., to be well settled that he for whose benefit a promise is made may maintain an action upon it although no consideration pass from him to the defendant, or any promise from the defendant directly to the plaintiff—a position which if true, as thus broadly stated, settles the question.

Edmundson v. Renney, 1 Barr, 334, may be put aside as not to the point, for there the consideration moved wholly from the party who was held to be the only proper plaintiff. *Botta Beers v. Robinson*, 9 Barr, 229, and *Vincent v. Watson*, 6 Harris, 96, may be regarded as falling within the distinction before adverted to as a fund realized or to be realized; for the promise was only to pay as far as the consideration received would go. But *Dallas v. Fagely*, 7 Harris, 279, is squarely up to *Hind v. Holdship*, and cites the dictum of Judge Rogers with approbation, and relies on the authority of the case. One partner retired from a firm and assigned his interest to his copartners on their undertaking to pay the debts, it was held that a creditor could sue the remaining partners on this promise.

On the other hand in *Blymire v. Boistle*, 6 Watts, 182, Mr. Justice Sergeant examines the authorities with his usual accuracy and discrimination, and states that although they are not all reconcilable with each other, they seem to warrant this distinction, that if one pay money to another for the use of a third person, or, having money belonging to another, agree with that other to pay it to a third, action lies by the person beneficially interested.

But when the contract is for the benefit of the contracting party, and the third person is a stranger to the contract and consideration, the action must be by the promisee. In further illustration of this distinction he adds: "where one person contracts with another to pay money to a third, or to deliver over some valuable thing, and such third party is thus the only person interested, he ought to possess the right to release the demand, or recover it by action. But, where a debt already exists from

one person to another, a promise by a third person to pay such debt, being for the benefit of the original debtor, and to relieve him from the payment of it, he ought to have a right of action against the promisor for his own indemnity, and if the promisor were also liable to the original creditor he would be subject to two separate actions at the same time for the same debt, which would be inconvenient and might lead to injustice."

The distinction taken in this case has been since recognized and applied. Especially *Remsdale v. Norton*, 3 Barr, 330, is very marked. A. being the debtor of B., at his request promised to pay the amount of his indebtedness to C., who was a creditor of B. C. cannot sue A. unless he has accepted him as a debtor in lieu of B. In a short *per curiam* it is said: in *Blymire v. Boistle* it was held, that the original debtor must have the means of enforcing a promise for the exoneration of himself, and that as both debtor and creditor cannot sue on it, he alone may. So in *Finney v. Finney*, 4 Harris, 380, the want of priority in a similar instance was relied on, and defeated the action on the authority of the same case. In *Campbell v. Laycock*, 4 Wright, 448; A. one of two partners, sold out to the other, B., who agreed to pay the debts, and gave C. as his surety. It was held that a creditor of the firm could not sue C., though if he could have sued B. on the contract, it is not easy to see why he could not also sue C. That case recognizes and is based on the distinction taken in *Blymire v. Boistle*, as does also the still more recent decision in *Robertson v. Reed*, 11 Wright, 115.

I am thus brought to the conclusion that the covenant contained in this lease is not so exclusively for the benefit of the holders of the bonds; that if the contract were not under seal, they could sue on it in their own names, and if so, as it appears to me, neither can they sue in the name of the plaintiffs.

I think it cannot be doubted that the lessors could sue for the breach of it for their own benefit and indemnity, and the covenantors be subjected to two separate actions on the same covenant, and for the same breach, which would manifestly lead to results both inconvenient and unjust.

Rule absolute.

R. N. Willson, Esq., and *Hon. Wm. Strong*, for equitable plaintiffs.

Samuel Dickson and *James E. Gowen, Esqs.*, for defendants.

Court of Quarter Sessions, Philadelphia County.

COMMONWEALTH v. REID.

1. It is no reason for a new trial in a case of felony that the reasons of the absence of a witness, who should have been present, were investigated while the jurors who were to try the case were in the court room.
2. Where the defence challenges jurors as they are called, and before going into the box, the commonwealth's attorney may reserve his challenges until those of the defence are exhausted.
3. Where two are indicted for procuring an abortion, and one of defendants just before the trial marries the woman on whom it was alleged the abortion had been produced, and then demanded a separate trial, which was granted: *Held*, that the wife was a competent witness against the other defendant.
4. Although the general rule is that husband or wife is not a competent witness against the other, yet the exceptions are where the witness is called in a collateral case where the evidence cannot be used in a suit or prosecution against the other, or where there is a separate trial of two defendants for an offence not joint, or where called to testify to personal injuries received from the other.
5. In the second case, the witness has the privilege to decline to answer such questions as will tend to criminate his or her wife or husband.
6. The term "quick with child," expresses the time subsequent to the mother feeling the child quicken; but the fetus is as much a living being before as after that time.

Opinion by Paxson, J. Delivered June 10th, 1871.

Twenty-six reasons in support of the motion for a new trial have been filed in the above case. The first, second, and third of said reasons refer to an alleged error of the court in allowing an investigation in the presence of the panel of jurors into the reason why an officer of the court had been unable to serve a subpoena upon one Annie McKeon, a witness for the commonwealth. The facts are that prior to the jury in the above case being impanelled and sworn, an officer of this court was called and examined publicly in court in regard to the absence of the said witness, and his efforts to procure her attendance. One of the co-defendants, Washington Paynter, was shown to have been in her company the previous evening. The counsel for Dr. Reid objected to a public examination into this matter in the hearing of the panel of jurors, which objection was overruled by the court. We do not see any error in this. Examinations of this nature are usually and necessarily in public, and if we were to sustain this objection it would be practically impossible to make any examination as to the absence of a witness without withdrawing the whole panel of jurors from the court room.

The fourth and fifth reasons allege error in overruling the prisoner's challenge for cause as to Thomas Stephenson and Thomas Hall, who were called as jurors. The ground of the challenge in each case was that the juror had been present in court during the investigation above referred to. The pris-

oner's counsel called two of the reporters of the press who were in court at the time, and who testified to the fact of such investigation having taken place in the presence of the panel of jurors, and upon this evidence they rested their challenge. They did not examine either juror to ascertain if he had heard what had transpired at the time. It was quite possible the attention of the particular juror was attracted by something else, and that he did not hear one word of the testimony of the officer, and even if he had the challenge for cause could not have been sustained upon that ground. In a capital case, where the rule upon this subject is enforced with most stringency, it is not enough to disqualify a juror that he has read and heard full accounts of the supposed offence. It must be shown that his mind has received thereby impressions as to the guilt or innocence of the accused which will influence his judgment notwithstanding the evidence. In this case there was no evidence that the juror even heard that which it was alleged might bias his mind. This challenge is wholly unsupported by either precedent, authority, or reason.

The sixth and seventh reasons allege error in permitting the commonwealth to challenge Andrew J. Damon, a juror, after the defendant had exhausted his peremptory challenges. It is to be noted that in stating these reasons the learned counsel have assumed the very point to be decided, viz.: that the district attorney had waived the challenges allowed him by law, when he came to challenge this juror. In order, therefore, that the grounds of my ruling upon this point may be understood, I will state the facts substantially as they occurred. When the clerk was about to call the jury into the box, the prisoner's counsel asked instructions of the court whether they should challenge singly, *i. e.*, as the jurors entered the box, or make their challenges when the box was full. As there was nothing before the court upon which a ruling could be had, I declined to give any advice as to the mode of challenging. The prisoner's counsel then commenced challenging as the jurors' names were called, as in capital cases, and when the box had been filled their challenges were exhausted. Up to this point the district attorney had not exercised his right of challenge, nor had he been called upon to do so. When the box was full he challenged the juror Damon, which was objected to by the prisoner's counsel, upon the ground that the district attorney had waived his right of challenge. I overruled the objection and sustained the challenge.

It was contended that under the 38th section of the criminal procedure act, which provides that all challenges in criminal proceedings shall be alternate, the commonwealth first challenging one person and then the defendant challenging one person,

the district attorney waived his right of challenge because he failed to exercise it until after the prisoner had exhausted his challenges; and the case of *The Commonwealth v. Frazier*, 2 Brewst. 490, was cited in support of this view. In *Hartzell v. The Commonwealth*, 4 Wright, 466, however, it was held that this rule does not apply to capital cases where the jurors are challenged as they enter the box, for the reason that in such case the commonwealth's challenges would be exhausted upon the first four jurors. The Supreme Court in *Hartzell v. The Commonwealth*, limit the rule requiring alternate challenges to "civil cases and misdemeanors, where the jurors are all called into the box before the challenges begin." *The Commonwealth v. Frazier* was a case of misdemeanor, and the jurors were all called into the box before the challenging commenced. Here the offence charged was a felony, and the defendant challenged as the jurors entered the box. If this mode of challenge was proper, then the case comes within the rule in *Hartzell v. The Commonwealth*. If, on the other hand, the challenging should not have commenced until after the box had been filled, the commonwealth could not be deprived of her challenges by the act of the prisoner in challenging out of time. The commonwealth can only be held to alternate challenges when the box is full.

The eighth, ninth, and tenth reasons bring us to the vital question in this cause, viz.: whether the wife of a co-defendant not upon trial can be examined as a witness for the commonwealth. It is important, because the case depends upon it. It is still more important from the fact that it involves a principle of law never yet decided in Pennsylvania so far as I am informed, and the authorities in regard to which elsewhere are conflicting and unsatisfactory. Much as we regard the interests of the parties in this particular case, they fade out of sight when we come to settle an important principle by which the rights and liberties of hundreds of others may be hereafter affected.

The defendant was jointly indicted with one Washington Paynter, under the 95th and 96th sections of the Criminal Code, with procuring and attempting to procure by the use of certain instruments and drugs upon the body of one Anne McKeon, then pregnant and quick with child, a miscarriage. On the day, or the day but one before the trial, Washington Paynter, one of the defendants, was married to the said Anne McKeon, who was the most important witness for the commonwealth, and without whose testimony the charge could not have been made out. When the case was called, the defendant Paynter moved for a separate trial. There being no objection on the part of the commonwealth, I allowed the motion, and the trial proceeded against Dr. Reid. When Anne McKeon

(now Paynter) was called to the stand, the prisoner's counsel objected to her competency as a witness, upon the ground that she was the wife of a co-defendant. The witness was examined upon her *voir dire*, and said that she had been married to Washington Paynter as above stated. The objection, after argument, was overruled, the witness was examined, and it was upon her testimony mainly that the prisoner was convicted. It is upon the propriety of that ruling we are now to pass.

The general principle that husband and wife cannot be examined for or against each other has been long and well established. But the extent of the application of this principle, and the exceptions thereto, are not very generally understood, and have given rise to a variety of conflicting opinions. I shall endeavor briefly to examine some of the most important authorities bearing upon this rule; the reason of the rule; how far it has been modified by recent decisions, and the exceptions thereto; and extract therefrom, if possible, the principles which should be our guide in this and analogous cases.

The case of *Rex v. Cliviger*, 2 T. R. 263, cited by the prisoner's council upon page 40 of their paper book, is the leading case upon the incompetency of the wife to give testimony criminating or tending to criminate her husband. This was the case of the settlement of a pauper. A marriage, in fact, had been proven between two paupers, after which the first wife was called to prove her prior marriage with James Whitehead, the male pauper. But the court held her incompetent. Says Ashurst, J.: "But the ground of her incompetency arises from a principle of public policy, which does not permit a husband and wife to give evidence that may even tend to criminate each other. The objection is not confined merely to cases where the husband or wife are directly accused of any crime; but even in collateral cases, if their evidence tends that way it shall not be admitted."

It will be observed that this case goes to the extent of excluding the wife even in a collateral proceeding where her husband has no direct interest in the issue upon trial. It was soon seen that the court had gone too far in *Rex v. Cliviger*, and the law of that case was shaken in *The King v. All Saints*, 6 M. & S. 194, and was overruled in *The King v. Bathwick*, 2 Barn. & Ad. 639, to the extent of limiting the rule to proceedings directly against the husband. Says Lord Tenderden, C. J., in the latter case: "The decision in *Rex v. Cliviger* appears to have been founded upon a supposed legal maxim or policy, viz.: that a wife cannot be a witness to give testimony in any degree to criminate her husband. This will be undoubtedly true in case of a direct charge and proceeding against him for any offence; in such a case she cannot be a witness to

prove his innocence of the charge. The present case is not a direct charge or proceeding against the husband. It is true that if the testimony given by both be considered as true, the husband, Cook, has been guilty of the crime of bigamy; but nothing that was said by the wife in this case, nor any decision of the Court of Sessions, founded upon her testimony, can hereafter be received in evidence to support an indictment against him for the crime."

The large number of English and American cases cited in the defendants paper book, to the point that a wife may not give testimony tending to criminate her husband, had their origin in *Rex v. Cliviger*, which I submit is not law now, to the extent that it formerly was—the rule being that a wife may give testimony tending to criminate her husband, in a collateral proceeding, where, as was observed by Lord Tenderden, in *The King v. Bathwick*, above cited, nothing that was said by the wife in her testimony, nor any decision of the court founded upon her testimony, can affect her husband.

"But though the husband and wife are not admissible as witnesses against each other, where either is directly interested in the event of the proceeding, yet, in collateral proceedings not immediately affecting their mutual interests, their evidence is receivable, notwithstanding it may tend to criminate, or may contradict the other, or may subject the other to a legal demand." Greenleaf on Ev. sec. 342, citing *King v. Bathwick*, and a number of other English and American cases.

"Although husband and wife are not allowed to be witnesses against each other where either is directly and immediately interested in the event of the proceeding, whether civil or criminal, yet in collateral proceedings not immediately affecting their mutual interest, their evidence is receivable, notwithstanding that the evidence of one tends to contradict the other, or may subject the other to a legal demand, or even to a criminal charge." Phillips on Ev. p. 78.

The same principle is recognised in Roscoe's Criminal Evidence. Says that learned author (see p. 147): "It is not in every case in which the husband or wife may be concerned that the other is precluded from giving evidence. It was, indeed, in one case, laid down as a rule, founded upon a principle of public policy, that a husband and wife are not permitted to give evidence which may tend to criminate each other (citing *Rex v. Cliviger*). But in a subsequent case the Court of King's Bench, after much argument, held that the rule as above stated was too large, and that where the evidence of the wife did not directly criminate the husband, and never could be used against him, and where the judgment founded upon such evidence, could not affect him, the evidence of the wife was admis-

sible." Citing *Rex v. All Saints*; 1 Phil. Ev. 164, 8 ed.; 6 M. & S. 194.

In Taylor on Ev. vol. 2, 5 ed., sec. 1227, sec. 1230, after stating the rule which excludes the husband or wife of one defendant from testifying against the other, the learned author says: "But though the rule of exclusion is thus stringent where a married person is criminally accused in conjunction with others, it is clear, that where a married defendant has pleaded guilty, or is entirely removed from the record, whether by a verdict pronounced in his favor, or by a previous conviction, or by the jury not being charged with his interest at the time of his trial, his wife may testify either for or against any other persons who may be parties to the record." Citing *Reg. v. Thompson*, 3 Fost. & Fin. 824; *Hawksworth v. Sholer*, 12 M. & W. 94; *Rex v. Williams*, 8 C. P. 284; and other cases.

The reason for the rule excluding husband and wife from testifying for or against each other is two-fold. First. The community of interest subsisting between husband and wife, and the identity of their legal right. If the husband has such interest in the matter in controversy as rendered him an incompetent witness, *a fortiori*, the wife was incompetent. Second. Motives of public policy which excluded them upon the ground that it would tend to disturb the harmony of the domestic relations to allow the wife or husband to be a witness for or against each other.

The principle which excludes a party in interest from testifying extends to husband and wife, and applies to all cases in which the interest of the other are involved. Greenleaf on Ev. § 334-5; *Rex v. Smith*, 1 Moody Cr. C. 289; *Rex v. Hand*, *Ibid*, 281. In the *Queen v. Denslow*; 2 Cox Cr. C. 230; *Reg. v. Bartlett*, 1 Cox, Cr. 105; and in *Reg. v. Sills*, 1 C. and Ker. 494, such evidence was rejected, because it tends to benefit the other.

So far as the husband and wife are excluded from testifying from motives of public policy, there would seem to be no reason for any distinction as to whether they are called to testify for or against each other. And in *Rex v. Sergeant*, Ry. and Moo. 352 (21 E. C. L. R. 453), it was held that there was no such distinction. The same principle is recognized by Greenleaf, "and when, in any case, they are admissible against each other, they are also admissible for each other." Roscoe lays down the rule thus: "The circumstance of one of the parties being called for or against each other makes no distinction in the law." See page 147. To the same point is Wharton, vol. i., § 770.

It must be borne in mind that there is a marked distinction between the competency of the husband or wife to testify where the other is upon trial, and the competency of either to testify

in a collateral proceeding, or in one that is analagous thereto. That this distinction has been lost sight of in many of the cases cited by the learned counsel for the prisoner, I think is very clear. Two of the cases cited, viz.: *Commonwealth v. Shriver* and *Commonwealth v. Gordon*, are undoubtedly at variance with the rule I have referred to. As to the first, I have no report beyond the brief syllabus in Wh. p. 700, pl. 1310. This is to be regretted, as we have no light as to how far the case was considered, and to what extent it is to be regarded as authority. In *Com. v. Gordon*, 2 Brewst. 507, in the trial of a man charged with adultery, it was held that the husband of the woman with whom the adultery was said to have been committed, was not a competent witness for the prosecution. "Not because (says Brewster, J.) this evidence can be used as evidence against him either for purposes of a defence in a desertion case, or of offence in a suit by him for a divorce, but he should not be heard, because the evident effect of his testimony is to affect the marital relations." There are no authorities cited by the learned judge, and it was probably ruled hastily at nisi prius and without subsequent consideration. Our most learned text writers, as we have already seen, and many of the modern cases, are the other way. To those already cited may be added, *King v. Rudd*, 1 Leach Cr. C. 157, where the wife was admitted to testify to the forgery of a bond which her husband had uttered; *The King v. Halliday*, 8 Cox Cr. C. 298, where the husband was admitted to prove that the wife had no authority to sign his name in a prosecution for forgery, in which the wife was charged in one count as a co-conspirator; and *Chamberlain v. The People*, 23 N. Y. R. 85, where on an indictment for perjury, committed in a divorce suit, the wife was held competent to prove sexual connections with him, which fact he had falsely denied in the divorce suit.

Many of the cases cited upon pages 40 and 41 of the defendant's paper book do not bear upon the principle referred to—that is, the competency of the husband or wife to testify in a collateral proceeding. In some of them other and material considerations entered into the judgment of the court, and in others the decisions have been modified by the cases I have cited. In *Rex v. Denslow*, 2 Cox Cr. C. 230, the defendants were tried jointly, and the testimony of the wife would have directly benefited the husband; *Corse v. Patterson* was a civil suit, in which the husband had a direct interest; the *State v. Burlingham* was a joint trial for conspiracy, and the wife was offered as a witness against her husband and his co-defendant; in *Sparhawk v. Buell*, 9 Vt. 41, the wife was offered to testify directly against her husband in a suit in equity; in *Rex v. Smith and Moody*, Cr. C. 289, the defendants were tried to-

gether for burglary. Draper, one of the defendants, after having called and examined one witness in his behalf, proposed to call his daughter in further proof of the alibi set up by him, but it appearing that she was the wife of the prisoner, Smith, the learned judge held she could not be a witness because her evidence would tend to benefit her husband; in *Rex v. Wood*, Id., the defendants were jointly tried, and the case was ruled upon the authority in *Rex v. Smith*, above cited; in the *Queen v. Bartlett*, Cox Cr. C. 105, the prisoners were jointly indicted for stealing potatoes. It appeared upon the evidence that some of the potatoes were found in the room of one of the defendants, and others in that of the other. One of the prisoners called the wife of the other to prove that the potatoes found in his apartment were not the property of the prosecutor. Weightman, J., after consultation with his colleague admitted the evidence. In the *Queen v. Denslow*, 2 Cox Cr. C. 105, the wife of a defendant was admitted as a witness for the co-defendant on a joint trial, upon the ground that each defendant had a distinct defence, and the conviction of the one did not necessarily involve the conviction of the other, and a doubt was expressed whether the case of *Rex v. Smith*, above cited, was law. To same effect is *Rex v. Sills*, 1 Car. & Kir. 494. In *Rex v. Sergeant*, R. & M. 352, it was held that the wife is not competent in a trial where another and her husband were charged with a conspiracy to abduct her; and it is placed upon the ground that a conspiracy is a joint offence of which both must be convicted or both acquitted. We shall presently see that the wife is competent against her husband upon a charge of abduction, where the force continued up to the marriage, and even in one case where there was no evidence of force. In *Pedley v. Wellesby*, 3 C. & P. 558, it was merely held that the fact of the marriage of a witness being after subpoena served upon her, did not affect the question of her competency as a witness. The cases of *State v. Welch*, 13 Shep. 30; *State v. Gardner*, 1 Root. 485; *Com. v. Sparks*, 7 Allen, 534; *Com. v. Shriver*, and *Gordon v. Com.* are evidently decided upon the authority of *Rex v. Cliviger* and other cases which rest thereon, and we have seen that *Rex v. Cliviger* has been expressly overruled. In the cases of *State v. Smith*, 2 Iredell, 402; *Pullen v. People*, 1 Dougl. 48; and *U. S. v. Wade*, 2 Cr. C. C. 680, it was held that the wife of one defendant is not a competent witness for his co-defendant, but these cases were decided upon the principle that the husband defendant not being a competent witness for the co-defendant, the wife was also incompetent, which was the ground of the ruling in the *People v. Bull*, 10 John. 85. The reason of the rule which excludes a defendant as a witness for his co-defendant is mani-

fest, and it would seem to extend with equal force to the wife. But no such interest exists where one defendant is called against his co-defendant, and therefore no disqualification on account of the husband's interest attaches to the wife. Hence it was ruled in *Wexon v. The People*, 5 Parker's Cr. C. 119, that where a co-defendant may be called as a witness, so may the wife. *Rex v. Georges*, Car. & M. 111; *Rex v. Gerber*, T. & M. 647; *Williamson v. Rex*, 1 L. R.

Rejecting, therefore, the cases which have been overruled, or modified, or are inapplicable, or where the wife has been held to be incompetent by reason of her husband's interest, the weight of authority seems to be overwhelming that in collateral proceedings the wife may be permitted to testify against her husband, even if her testimony tend directly to charge him with crime. And I think the rule is sustained by reason as well as authority. While there is some force in the rule as laid down in *Rex v. Cliviger*, that to permit a wife to give testimony that tends to criminate her husband may disturb in some instances the domestic relations, it must be borne in mind that it is perhaps a choice between evils, and that if the broad rule in that case were the law, society would suffer greatly by the closing of the mouths of witnesses as to transactions of which they are alone competent to testify. The individual evil in isolated cases must give way before the public policy and necessity which imperatively require that the mouth of a witness shall not be closed for private reasons where the general interests of the public are affected thereby.

This brings us to the question whether in the case of two defendants, jointly indicted and separately tried, the wife of the defendant not upon trial may be examined as a witness for the commonwealth.

Something may perhaps depend upon the character of the proceeding. Where the offence is joint, as in conspiracy, and the defendant not upon trial must necessarily be affected by the verdict, it may well be questioned whether she would be competent; and so in any other case where both defendants are necessarily involved. But where one may be acquitted and the other convicted, the same reason does not exist. And hence it must be observed that there is a clear distinction between the competency of the witness and the privilege or right to decline to answer to facts criminating his or her husband or wife. The witness may be competent for some purposes, and not for all purposes.

Is there any solid distinction between what is known as a collateral proceeding and a separate trial, where the offence is not necessarily joint? In other words, is there any real difference as affecting this question between a separate indictment

and a separate trial? If the prisoner had been indicted separately, I have no doubt, under the authorities cited, Mrs. Paynter would have been a competent witness for the commonwealth, notwithstanding the fact that her husband was charged with the same offence in another bill.

Why? The reason is clearly stated by Lord Tenderden in the *King v. Bathwick*, that "nothing said by the wife in the case, and no decision of the court founded upon her testimony, could be thereafter received in evidence against the husband, upon an indictment charging him with the crime." And in *Taylor on Ev.*, before cited, the fact of "the jury not being charged with his, (the husband's) interest at the time of the trial," renders the wife competent. In *Phillips on Evidence*, p. 90, he says: "Where, however, of two or more, one of them is not upon trial at the time when the others are tried, the wife of the party not upon trial is admissible as a witness," citing *King v. Williams*, 8. C. & P. 284; cited by Baron Alderson, in 12 M. & W. 49; *King v. Shintell*; *Queen v. Sill*, 1 C. and Kir. 494. To the same point is Wh. Amer. C. L. § 768.

"But although in these cases the wife will be permitted to testify against her husband, it by no means follows that she will be compelled to do so, and the better opinion is, that she may throw herself upon the protection of the court, and decline to answer any question which may tend to expose her husband to a criminal charge." *Taylor on Ev.* sec. 1233.

In *Roscoe's Nisi Prius Ev.* p. 176, 12 ed., the rule is thus stated:

"There has been some confusion between incompetency and privilege; and it was at one time thought a husband or wife was in every case an incompetent witness with respect to any fact which might have a tendency to criminate the other (*Rex v. Cliviger*), but that decision is no longer law; all subsequent cases, with one exception, (*Rex v. Gleed*, 3 Russ.) treating husband and wife, excepting in an indictment against each other, as competent witnesses.

"But though the husband and wife are in such cases competent, it seems to accord with principles of law and humanity that they should not be compelled to give evidence which tends to criminate each other; and in *Rex v. All Saints*, 6 M. and S. 184, Bailey, J., said, that if the witness had thrown herself upon the protection of the court, on the ground that her answer might tend to criminate her husband, he thought she would have been entitled to it."

The same doctrine is recognized in *Roscoe's Crim. Ev.* See pages 147-148.

There are a number of cases in which the wife has been ad-

mitted to testify against her husband when separately tried, or in which the principle has been distinctly recognized.

In the *Commonwealth v. Easland*, a case determined in the Supreme Judicial Court of Massachusetts (1 Mass. 15), the application was to admit the wife where her husband was on trial jointly with other defendants. The court (Strong, Sedgwick, Sewall, and Thatcher, Justices) ruled unanimously that she could not be examined. But say the court, "To have had the benefit of her testimony they should have moved to be tried separately from the husband, which the court would have granted had this been assigned as the reason for the motion." This court has long been distinguished for the learning and ability of its judges, and for this reason the case last cited would seem to be entitled to great weight.

In *Wixon v. The People*, 5 Parker Cr. C. 119, it was held that the wife of a co-defendant, not on trial, might be examined for the commonwealth against the other defendant when he is separately tried. The same point was decided in *State v. Anthony*, 1 McCord, 285, while in *State v. Worthington*, 31 Maine, 62, it was ruled that where one of two joint defendants defaulted on his recognizance, his wife was held a competent witness for the other.

The only case cited by the defendant which I regard as in direct conflict with this principle is *People v. Colburn*, 1 Wheeling Cr. C. 479. In that case John Colburn and Elizabeth Weir were indicted for forgery. The former only was placed upon trial, Mrs. Weir never having been arrested. A *nolle prosequi* was entered as to her, but the recorder rejected the testimony of her husband as a witness for the commonwealth. Says Recorder Riker, "The prosecutor's wife is a party to the record, and the testimony on this might be such that the commonwealth would feel bound to issue a warrant for her apprehension. Even, a *nolle prosequi* by the district attorney would not be a conclusive discharge. She would still be liable to arrest and trial. Had she been tried and acquitted by a jury the husband might then be a witness against the prisoner, for his testimony could not in that case inculpate his wife." This was evidently an unconsidered case; no authorities were cited by the recorder, and his decision lacks the weight of authority.

State v. Bradley, 9 Rich. Law (S. C.), 168, cited by defendant upon this point, is against him. In that case the husband was jointly indicted with another, but was not upon trial. The wife was admitted to testify for the prisoner on trial, but was not permitted to state anything which would criminate her husband. We have already seen that if competent to testify for the prisoner on trial, she was competent to testify against him.

But, aside from the considerations above noted, what right has the prisoner to object to the testimony of the witness upon the ground that she is the wife of a co-defendant? The privilege—and it is only a privilege—which exempts the wife is not his. It is properly the privilege of the husband. If the commonwealth had called Washington Paynter to the stand, the prisoner could not have objected. The witness might have claimed his privilege and declined to answer. But that he would have been a competent witness for the commonwealth, if willing to testify, is too well settled to need authority; and if the husband be competent, why not the wife?

I have so far considered only the general rule as applicable to husband and wife. I propose to go a step further and examine the exceptions to the rule, and to see whether this case comes within any of the exceptions. It is well known that hardly a week passes in our criminal court in which the testimony of a wife is not received against her husband. In many instances the husband is convicted and sentenced upon the unsupported testimony of the wife. And this is not because such testimony may not impair the harmony of the domestic relations, but because there are other and higher interests which demand that in certain cases the mouth of the wife shall not be closed, even though she open it only to charge her husband directly with crime.

The exceptions to the general rule are such as arise from the necessity of the case, partly for the protection of the life and liberty of the wife, and partly for the sake of public justice. In all manner of offences involving personal injury to the wife, or affecting her liberty, she has been allowed to testify directly against her husband. Thus a woman is a competent witness against a man indicted for forcible abduction and marriage, if the force were continuing upon her until the marriage, of which fact she is also a competent witness, and this by the weight of the authorities, notwithstanding her subsequent assent and voluntary cohabitation; for otherwise the offender would take advantage of his own wrong. Greenleaf, § 343, citing numerous cases. In a case before Mr. Baron Hulloch, where the defendants were charged, in one count, with a conspiracy to carry away a young lady under the age of sixteen, from the custody appointed by her father, and to cause her to marry one of the defendants, and in another count with conspiring to take her away by force, being an heiress, and to marry her to one of the defendants, the learned judge was of opinion that even assuming the witness to be at the time of the trial the lawful wife of one of the defendants, she was yet a competent witness for the prosecution, on the ground of necessity, although there was no evidence to support that part of the indictment which charged

force; and also on the ground that the latter defendant, by his own criminal act, could not exclude such evidence against himself. *Wakefield's Case*, 2 Lewin's Cr. C. 1, 20, 279; 2 Russ. 605; 2 Stark. Ev. 402 (n), 2d ed. 1 Roscoe's Cr. Ev. 151. In *Lord Audley's Case*, who was tried before the House of Lords in 1631, as a principal in the second degree for a rape upon his own wife, she was permitted to testify. 3 Howell's St. Tr. 402. Upon the trial the following question was propounded to the judges: "Whether the wife in this case might be a witness against her husband for the rape?" and the answer was, "She might: for she was the party wronged, otherwise she might be abused. In like manner a villein (vassal) might be a witness against his lord in such cases."

This case was at one time thought not to be law, but it is now recognized in all the leading text books. In all cases of personal injuries committed by the husband or wife against each other, the injured party is a competent witness against the other. So in cases affecting the marital rights and duties the wife has been held competent. In *Nathan's Case*, 2 Brewster, 149, the wife was admitted to prove both the desertion and the marriage, and such is the constant practice in this court in like cases.

Upon the like ground of necessity the wife has been permitted to prove certain secret facts, which no one but herself could know. Thus, upon an appeal against an order of filiation, in the case of a married woman, she was held a competent witness to prove her criminal connection with the defendant, though her husband was interested in the event. *Greenleaf*, sec. 344. *Com. v. Shepherd*, 6 Bin. 283.

Recent legislation in England, in this State, and many of the other States of the Union, as well as the current of judicial decision, indicate the policy of the law to be not to impose any unnecessary restrictions upon the competency of witnesses, but to permit questions affecting their interest or prejudices to go to their credibility. In this State the law allowing the parties to a suit to testify has been extended to the parties in a divorce suit. In view of all these facts, for us now to return to the exploded doctrine of *Rex v. Cliviger* would be to take a retrograde step, without sound reason and authority to sustain us.

From the authorities cited we may safely deduce the following rules, viz.:—

First. That although the general rule undoubtedly is that husband or wife may not testify against each other, yet in collateral proceedings they may testify to facts tending to criminate each other.

Second. That where upon a joint indictment there is a sep-

arate trial, the husband or wife of the defendant not upon trial is not necessarily an incompetent witness for the commonwealth. If willing to be examined, he or she is competent, except perhaps, where the offence is in its nature joint, as in conspiracy.

Third. That while in such cases the husband or wife is a competent witness for the commonwealth, it is, notwithstanding, his or her privilege to decline to testify to such facts as will criminate the other.

Fourth. That husband or wife may testify directly against each other in cases of personal injuries to either committed by the other; and, also, as to facts which are in their nature secret, and affecting the person.

Applying these principles of law to the facts of this case, we shall have no difficulty in disposing of the reasons now under consideration. The witness, Anne McKeon, did not object to being examined. The objection came only from the prisoner. She was not offered as a witness against her husband or to criminate him in any way, and in fact made no reference to him during her examination-in-chief. The offence was not necessarily joint, and the verdict for or against the prisoner could not affect her husband. Except in form, the cases were as distinct as though they were separately indicted. In form it was a proceeding against her husband. In substance the inquiry was purely collateral, for her husband could not be affected by her testimony. Nothing that was said by her, and no judgment of the court based upon her evidence, could ever be received against him upon the trial of the indictment charging him with the same offence. This, and not the form of the proceeding, is the true test of the admissibility of the testimony.

But it is submitted that she was a competent witness for another reason. The offence was of a secret nature, affecting the person of the wife. The indictment charges that the crime was committed with the aid of certain instruments and drugs. It involved an act of personal violence to the wife. It is conceded that if an assault and battery had been charged, she would have been competent. But we must look at the substance of the offence laid as well as the form. But even in the latter aspect it is to be observed that the bill charges the offence to have been committed with "force and arms," etc. And this is a matter of substance. Its omission would have been fatal. Nor is there anything to show that the witness was a consenting party. In no part of her testimony did she say that she consented to the operation for the purpose of procuring a miscarriage. The evidence does not show that she knew the nature or the effect of the operation. She says she went to the prisoner's office to be examined. The question whether her object was not to procure an abortion was ob-

jected to by the prisoner's counsel, and ruled out by the court. In the absence of proof, there can be no presumption that she consented to, and was a participant in, a felony. In such case if the mouth of the wife is to be closed by an inflexible rule of law, any wife who could be deceived by her husband, and a corrupt physician, might have a miscarriage brought on, and the law be utterly impotent to punish either. Some of the counts charge the offence to have been committed by the use of certain drugs. Any married lady might be made the victim of such a crime as this by the use of the latter means. Surely, if there ever was a case of secret crime, affecting the person of a woman, in which she ought to be at liberty to speak, it is this. Shall we say that a woman may be a witness to prove her marriage in a desertion case—a fact ordinarily susceptible of proof by other witnesses—and hold that where her offspring has been destroyed in her womb by her husband and a physician conveniently called in for that purpose, that she is an incompetent witness, not on the trial of her husband, but of the physician? I know of no case in which the rule of necessity before referred to applies with greater force than to the one now under consideration.

It would seem, therefore, that the objection to the competency of this witness was not well taken.

The eleventh reason I do not regard as important. The instructions complained of amounted practically to this: that the district attorney advised the witness when she went upon the stand that she was not bound to answer any questions which would criminate her husband. This was a proper instruction, and would have been given by the court, if asked for.

The twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, and eighteenth reasons refer to alleged errors of the court in refusing to compel the witness, Anne Paynter, to answer certain questions asked her upon cross-examination. As before stated, the witness did not mention the name of her husband upon her examination-in-chief. In speaking of one of her visits to the prisoner, she said "We went to Dr. Reid's office." Upon her cross-examination she was asked who she meant by "we." This question she declined to answer, upon the ground that it would criminate her husband, and this objection was sustained. And again, upon cross-examination, she was asked: "On these occasions, when you say Dr. Reid (the defendant) operated on you, who was present?" Which question the witness declined to answer for a like reason, and with a similar result.

It was urged that the witness had told but a part of the truth, whereas the law requires the whole truth, and that by

voluntarily going upon the stand she waived her privilege and was bound to disclose all she knew upon the subject.

Where a witness is sworn to tell the whole truth, it means to tell so much of the truth as may be competent evidence. He also takes the oath subject to the rule of law which allows him to decline to answer questions which will criminate him.

It is perhaps true that where a witness, after being cautioned that he is not bound to disclose a criminal transaction in which he was criminally concerned, understandingly waives his privilege, and goes on, he cannot afterwards claim his privilege, but must state the whole transaction. In Sharswood's *Starkie on Evidence*, the law is so stated in note to page 206. But there are authorities which hold that the privilege may be claimed at any time. But I do not deem it necessary to discuss the principle at length, nor the large number of authorities collected by the counsel for the defendant upon pages 44, 45, 46, of their paper book, for the reason that this case rests upon different principles. So far as the evidence shows, the witness, Anne Paynter, did not go on the stand to testify as to any transaction in which she was a guilty party. She had no need to shield herself, nor did she decline to answer any question upon the ground that it would tend to criminate herself. The privilege she claimed was for her husband. Not was she at any time advised by the court or counsel that she need not testify to the transaction if it criminated her. The privilege which she claimed was not to criminate her husband, and this perhaps, she could not waive, as it belonged as much to him as to herself, and was exclusively for his benefit. "Where one party, though competent, is not bound to answer a particular question, because it would criminate him, the husband or wife, is not obliged to answer the same question." *Greenleaf*, § 487. None of the cases cited by defendant are cases where husband or wife claimed the privilege not to criminate the other, but are all cases where a witness had claimed the privilege not to criminate himself.

But, it is not enough to show upon a motion for a new trial that evidence was improperly rejected. It must appear that the evidence was such as, if admitted upon the second trial, ought to produce a different verdict. The Supreme Court have repeatedly held, that they will not reverse for errors which are immaterial, and not affecting the result. In this case it is difficult to see how the verdict could have been different had the questions referred to been answered. If the object of the prisoner was to contradict the witness, it is evident her husband could not have been called for that purpose, for the reason that he was a co-defendant; if some person other than her husband was present, that fact was as well known to the prisoner as to

the witness, and the former could have called him or her to the stand. The learned counsel evidently assumed that the only person present was the husband of the witness, from their entire neglect by a change of the form of the question, to ascertain whether some person, not the husband was there. Such course was open to them, had they desired to attack, by such person or persons, the credibility of the witness. Such offences are not generally committed in the presence of an unnecessary number of spectators, and I can, therefore, readily understand the reason why the learned counsel omitted further to cross-examine the witness on this point. All of the facts connected with this transaction as between the prisoner and the witness, were detailed by the latter. It could not have helped the former for the witness to have stated that her husband was present, or even that he was a participant in the offence. I cannot see that the prisoner has been injured by this ruling.

The other question which the witness declined to answer upon cross-examination was this:—"Did you, on the Sunday evening after the Thursday evening on which you say the child was born have connection with any man?" This was not cross-examination. If material to the defence, it could not be brought out in that way. Nor does the case come within the rule of *The People v. Madam Restell*, 2 Barb. 216, in which the court say, "The witness in this case had voluntarily proclaimed her own infamy in having constant illicit intercourse with one individual for nearly a year, and in aiding, at least, in procuring an abortion of her child, for the purpose of fixing a criminal charge upon the defendant. She thereby precluded herself from claiming any privilege of not answering questions of a similar character, if they related to the same point." Without in any manner questioning the law of that case, it is sufficient to say that the facts are widely different. Here the witness had not voluntarily proclaimed her own infamy at all. The only thing she said from which such a charge could be inferred was that she was a single woman at the time the offence was committed. The question to which this answer was responsive, was not legal cross-examination, nor was it material, as no such issue was raised by the pleadings.

The nineteenth reason alleges error in not affirming the prisoner's first point. The point is not set out in the reason, but it was substantially that there was no evidence that the said Anne McKeon was pregnant and quick with child, as laid in the fifth, sixth and seventh counts of the said indictment.

I declined to say to the jury that there was no such evidence, in which I can see no error.

I did not charge the jury precisely as stated in the twentieth reason. On the contrary, I charged as follows:—

"In order to convict under the fifth, sixth and seventh counts, the jury must be satisfied from the evidence that Anne McKeon was pregnant and quick with child, and that the illegal acts charged in the bill, or some of them, resulted in the death of the child of which she was quick."

I further stated to the jury, in explanation of the term, "quick with child," that quickening is the incident, not the inception of vitality.

I am unable to see any error in this. It was formerly held that quickening was the commencement of vitality with the fœtus, before which it could not be considered as existing. But this view is no longer held by our most eminent writers. Dr. Gray calls it an "exploded" doctrine. *Med. Juris.* 133. See also *W. & S. Med. Juris.* 344-5. Dr. Beck in his excellent work on medical jurisprudence, vol. 1, p. 173, says:—

"The motion of the fœtus, when felt by the mother, is called quickening. It is important to understand the sense attached to the word formerly and at the present day. The ancient opinion, and on which, indeed, the laws of some countries have been founded, was that the fœtus became animated at this period; that it acquired a new mode of existence. This is altogether abandoned. The fœtus is certainly, if we speak physiologically, as much a living being immediately after conception as at any other time before delivery; and its future progress is but the development and increase of those constituent principles which it then receives." To the same point is Orfila, a very high authority. See *Traité de Médecine Légale*, Paris, 1848, vol. 1, p. 226.

In a leading English case, in an investigation before a jury of matrons, Gurney, B., said, after taking medical counsel: "Quick with child is having conceived; with quick child is where the child has quickened." *R. v. Wycherly*, 8 C. & P. 265. This principle is recognized by Wharton, vol. 2, p. 1230, and is the modern doctrine upon this subject.

I have no recollection of the facts referred to in the twenty-first reason, but presume I gave the jury some information asked for by them when they came back to the court room. I do not see any error in this, nor was this reason pressed upon the argument.

Nor can I see any error in that portion of the charge referred to in the twenty-second reason. I said to the jury that there was no evidence that the fœtus was dead prior to the operation, and that in the absence of any such evidence they would have no right to presume its death. The learned and very able argument upon this point has failed to show me wherein I was wrong. The fœtus is a living, not a dead thing, and where life

has once been shown to exist, it is presumed to continue, until the contrary is made to appear.

The twenty-third, twenty-fourth, twenty-fifth and twenty-sixth reasons are the usual formal ones, that the verdict is against the law, the evidence, and the weight of the evidence. I have already endeavored to demonstrate that the verdict was not against the law. Careful examination and reflection have failed to satisfy me that it is against either the evidence or the weight of the evidence. On the contrary I am unable to see how the jury could properly have arrived at any other result.

I am not unmindful of the fact pressed upon me with great eloquence and zeal by the counsel for the defence, that this case is of supreme importance to the prisoner. I am aware that this decision involves the destruction of all the prisoner's hopes in the future, so far as this world is concerned. But it must be remembered that he has brought this ruin upon himself—not in any high calling, or with any exalted aim, but in the prosecution of a dark and infamous crime. Nor must the fact be lost sight of that I owe a duty to society, and one which rises far above any considerations personal to the prisoner. That duty and the law, which I am bound faithfully to administer, require that judgment should be entered upon this verdict.

There are three reasons filed in support of the motion in arrest of judgment. They were not seriously pressed upon the argument, and after examination I have no hesitation in saying that none of them are sustained by the law.

In view of the importance of the principles involved in this case, I have submitted this opinion, and the elaborate paper books of the prisoner and the commonwealth to my colleagues, all of whom concur in the conclusions above indicated.

The rule for a new trial is refused, and the motion in arrest of judgment is overruled.

[Legal Gazette, June 16, 1871, Vol. 3, p. 185.]

Court of Common Pleas, Philadelphia County.

IN EQUITY

WILLIAMSON v. BECK et al.

Foreign attachment does not lie against the personal representatives of a decedent.

Opinion by PAXSON, J. Delivered June 10th, 1871.

This was a rule to show cause why the writ of foreign attachment, issued in the above case, should not be quashed as to Frank Beck, executor of Samuel Beck, deceased.

Foreign attachment does not lie in this State against an executor for a debt due from his testator, for the reason that it would interfere with our statute regulating the distribution of the estates of decedents. It would enable the attaching creditor to disturb the order of the payment of debts prescribed by law. The cases cited by the plaintiff do not sustain his case. *Fitch v. Ross*, 4 S. & R. 557, merely decides that the death of the defendant in the attachment after final judgment, does not dissolve it. That is a very different question from the one now before us. On the other hand, *McCoombe v. Drinck's Ex'r*, 2 D. 13; and *Pringle v. Black's Executor*, Ibid. 97; are full to the point, that a foreign attachment will not lie against the representative of a deceased person for the debt of the latter; and the same principle is recognized in *Bushel v. The Ins. Co.*, 15 S. & R. 173; *Bank v. Call*, 4 Bin. 371; and a number of other cases. Aside from authority, the case is too clear upon principle to need illustration.

Rule absolute.

[Legal Gazette, June 16, 1871, Vol. 3, p. 183.]

Court of Common Pleas, Philadelphia County.

IN EQUITY.

METZ BROS. v. FARNHAM et al.

1. An account will not be decreed where the plaintiffs are indebted to the defendant.
2. Nor will an injunction to restrain defendants in the bill from suing at law, be granted where the claims of the plaintiffs in the bill against the defendants, can be adjudicated in such suit, the debtors cannot, by becoming themselves plaintiffs, force the creditors into any particular forum.

Opinion by PAXSON, J. Delivered June 10th, 1871.

This was a motion to continue a special injunction, and for an account. The plaintiffs allege that they are the manufacturers of an article of merchandise called "The Grand Duchess Skirt," and that in the year 1868, they made an agreement with the defendants, by which the latter agreed to receive on consignment all of plaintiffs' goods, making advances thereon to the extent of sixty-six and two-thirds per cent. on their market price, and also to loan plaintiffs the sum of \$20,000, to enable them to carry on their business. The plaintiffs continued to consign their goods to defendants during the years 1868 and 1869, until the month of December, of the latter year, when the latter retired from the commission business. The plaintiffs allege that the defendants sacrificed their goods, that they sold them out of season in large quantities, and in violation of instructions, and below the limit placed thereon by plaintiffs. One large sale to N. B.

Clafin & Co., in the latter part of 1869 amounting to \$79,000 is specially referred to as an instance of such sacrifice. The latter further allege that although the defendants claim a large balance due them, yet if said defendants should be required to account, as in law and equity they are bound to do, for the goods consigned to them at the prices at which they were limited, and wrongful allowances, made without authority, be stricken out, and the proper charges and allowances of interest made, a large balance would be found to be due the plaintiffs from the said defendants.

The plaintiffs further allege that the defendants have lately threatened to institute legal proceedings for the balance claimed by them; and it was to restrain them from so doing that the plaintiffs ask to have this special injunction continued.

The defendants have submitted a number of affidavits, in which they deny the equities of the plaintiffs' bill; and further allege that the plaintiffs are indebted to the defendants over and above all goods consigned to and sold by them, in the sum of fifty-one thousand dollars.

The affidavits establish very clearly that the plaintiffs are indebted to the defendants in a very considerable sum. This appears from the letters of the plaintiffs themselves. The correspondence shows that the latter were being pressed by the defendants for a settlement of the balance due the latter, the question at issue being the amount of the balance, not its existence. Under such a state of facts are the plaintiffs entitled to an account, and while such a proceeding is pending to an injunction restraining the defendants from proceeding at law to recover a judgment for the balance claimed to be due to them?

In a bill praying for an account, it is necessary to aver that there is a balance due the plaintiff from the defendant; without such averment, sustained by proof to satisfy the mind of the chancellor, he will not decree an account. Account for what? If the defendant owes nothing why should he account to the plaintiff? In *Campbell v. Campbell*, 4 Holst's Ch. R. 743, it was held, that the chancellor not only may, but ought to refuse an account, if he is satisfied upon the evidence that nothing is due the plaintiff; and in *Volmer v. McCauley*, decided in this court on June 11th, 1870, the bill was dismissed upon this ground.

The attempt to restrain the defendants from proceeding at law to recover a judgment against the plaintiffs for a balance admitted to be due from them is equally indefensible. There is no rule of equity which prevents a creditor from commencing suit against his debtor in any court he may select, which has

jurisdiction of the claim. The effect of this proceeding would be not only to restrain the creditors, the admitted creditors of the defendant, from proceeding at law, but to compel them to come in, and submit to the jurisdiction and the tribunal selected by the defendant. That it is not competent for the latter to do this is manifest.

Nor is it easy to see how the rights of plaintiffs can be prejudiced by this view of the case. If the defendants omit to commence proceedings at law, the latter will lose their debt. If they bring such suit the plaintiffs in this bill as defendants in that suit, have a full and complete remedy. That which they complain of here can beset up as a defence. Every ground of equitable relief alleged in their bill would be admissible at law under proper pleadings. Equity may or may not furnish a more convenient process by which to adjust the rights of the parties, but it is not competent for the debtor, by coming into that forum, to prevent his creditor from pursuing his remedy at law.

The decree for an account is refused, and the injunction dissolved.

[Legal Gazette, June 16, 1871, Vol. 3, p. 183.]

Orphans' Court, Philadelphia County.

MILLIGAN'S ESTATE.

1. A surcharge in a guardian's account with his minor, of an amount which appears by the record to have been a balance on hand on a fourth account filed in another State, of the executor of the minor's testator, without any evidence showing that the guardian received the money, and in the face of his testimony that he had charged himself with all the money received by him, is erroneous.
2. Where one of the minors, after coming of age, states an account with his guardian, and asks the auditor to confirm it, and the guardian agrees, it is error in the auditor to make a surcharge against the guardian in such account.
3. Sect. 8, rule III., of the Orphans' Court, and the act of Assembly of 14th April, 1870, governing auditors' fees, will always be enforced by the court on exceptions filed.

Sur exceptions to auditor's report.

Opinion by PAXSON, J. Delivered June 24th, 1871.

The most important exception in this case is to the item of \$1,401.83, with a portion of which the auditor has surcharged the accountant. The facts upon which he made this surcharge are substantially as follows:

The entire fund in the hands of the guardian was derived from the estate of James P. Gannon, late of Washington, D. C. His will contains the two following provisions, viz.:

- 1st. That five thousand dollars should be invested in six per

cent. stock of the corporation of Washington, to be divided at the death of his wife in equal shares to any lawful issue of the bodies of his two sisters, Mary Ann Barton and Catharine Milligan.

2d. That the further sum of five thousand dollars should be in like manner invested under the same restrictions and provisions, and interest thereon paid to Catharine Milligan during her life, and at her death, the principal, with interest thereon from her death, should be distributed in equal shares to the lawful issue of her body.

Catharine Milligan died in September, 1854, leaving five children surviving her, three of whom were the minors whose estate is the subject of this account.

George A. Milligan was appointed guardian of said minors by this court, February 16th, 1855.

Mary F. Gannon, the widow, died on or about October 29th, 1858. There were living at her death five children of Catharine Milligan, and seven children of Mary Ann Barton.

The first five thousand dollars referred to in the will of James P. Gannon, were invested by his executors as directed by said will, and the proportion thereof due Milligan's minors, upon the death of the widow, was received by the guardian, and has been brought into his account.

No investment appears to have been made by the executors under the second provision of the will, but the auditor finds from a certified copy of the accounts of the executors, filed in the Orphans' Court for the district of Columbia, which embraces all the returns filed in said court, that there appears on the third of February, 1855, in the last account filed by them, a balance in the hands of the executors of \$1,401.33.

It did not appear that any portion of this balance was ever received by the accountant, yet the auditor had surcharged him, in stating the account of each minor, with the share (one-fifth) said minor would have been entitled to of said sum, if the money had actually been received by the guardian. And he does so upon the ground that it was the duty of the guardian to have collected this money, and that in the absence of any reasonable explanation as to why it was not done, he should be surcharged therewith. Upon this point the auditor says: "The guardian employed W. C. Milligan as his attorney to collect the money from the executors, and says that he does not know how much money W. C. Milligan received from Washington he only knows how much he turned over to him. The full amount that he accounted for to me (the guardian) was the same as stated in my account, viz.: \$2,140.60. There is no evidence to show that this balance of \$1,401.33 was exhausted in expenses for litigation or otherwise; neither is there any

to show that it was retained by the executors to meet expenses likely to accrue to the estate."

The guardian appears to have had a settlement with the executors on the 22d of February, 1859. The account in which the above balance of \$1,401.33 appears, was filed about four years prior thereto.

A certified copy of the account filed in Washington by the executors of James P. Gannon, with the proceedings thereon, was produced upon the argument, and although the evidence in this case is not regularly before us, I have looked at the record referred to in order to see if it contained anything to sustain the decision of the auditor. After such examination, and a consideration of the facts as stated by him, I am unable to concur with him in his conclusion. The account of the executor, which is made the basis of this surcharge, is a fourth account, and does not upon its face appear to have been a final account. It merely shows a dealing with the estate, receipts of money, and disbursements thereof, and a balance of \$1,401.33 in the hands of the executors. This balance may or may not belong to Miligan's minors. There is nothing upon the face of the account to show that it does. There is no decree of any court awarding it to them. There is a fair presumption that it was not needed for the payment of debts, but there is no proof of that fact. On the other hand, we have the explanation of the accountant that he employed an attorney to collect the money due his wards from the executors; that he does not know how much money his attorney received; but that the latter forwarded him the sum of \$2,140.60, all of which he has charged himself with in his account. Under these circumstances, I think that before the accountant can be surcharged with any portion of this sum of \$1,401.33, it must be shown that it belonged to his wards, and could have been collected from the executors. It may also be a question of some doubt how far a guardian appointed by a court of this State, can be surcharged with assets in another State belonging to his wards. His appointment gives him no legal control of the property of his ward outside of the commonwealth. By the law of this State, "no appointment of guardian, made or granted by any authority out of this State, shall authorize the person so appointed to interfere with the estate, or control the person of a minor in this State." Act of 29th March, 1832, section 7; Purdon, p. 278, pl. 36. A foreign guardian may, in the discretion of the court, be appointed guardian here by giving security; and the resident guardian by our statute, may, with leave of court, surrender up the assets to the foreign guardian upon satisfactory proof of entry of security by the latter at the place of his residence. This, however, only applies to cases where a similar

rule prevails by the law of the domicile of the foreign guardian. It would, therefore, be a very hard rule to hold a guardian responsible for not collecting the money of his ward in a jurisdiction where his appointment as guardian has no validity. It is true, in this case, he has collected a portion of the money to which his wards are entitled under the will of Mr. Gannon, from the executors in Washington, but whether it was paid voluntarily or otherwise we are not informed. It is also to be observed, that Mrs. Barnes, the only one of Mrs. Milligan's children who now insists upon this surcharge, has been of full age for some years, and since that time competent to sue in her own right for her proportion of said fund. The right of her guardian, as such, to demand payment thereof, ceased upon her majority, and if we were to surcharge him now, it is difficult to see how he could sue the executors and recover it back.

The accountant further excepts, because the auditor has reported upon the estate of Delia A. Milligan, one of said minors, who has been dead for several years, and whose account was not before him, thereby imposing additional costs upon the estate.

Wm. F. Milligan, one of the wards, also excepts to the costs of the audit so far as his own account is concerned, and alleges that he was fully satisfied with the account of the guardian as filed.

We will consider these objections together. In obedience to a citation, issued at the instance of Mrs. Barnes, the guardian filed a general account in the register's office as to all his wards, some of whom were still under age. This was evidently intended as a triennial account, and should have been filed in the Orphans' Court. Subsequently, he filed an account as to Isabella Barnes only, in the register's office. This account commenced with a balance taken from the triennial account, and in itself was wholly incomplete and unintelligible. Both accounts were referred to the present auditor, whose report was excepted to, partly from the reasons above indicated. The exceptions were sustained, the report set aside, and this court on the 16th of February, 1871, made an order directing the auditor to state an account as to such of the wards as had arrived at full age, using the other two accounts referred to as the basis thereof. In pursuance of said instructions, he proceeded to state three separate accounts, viz. : one as to Isabella Barnes; one as to William F. Milligan, both of whom were of age; and one as to Delia A. Milligan, who had been dead for some time. Her father (the accountant) was her heir-at-law, and there was perhaps no necessity to have stated the account as to her. William F. Milligan appeared before the auditor and handed him a statement of the account between the guardian and himself, with which they were both satisfied, yet the audi-

tor has stated an account as to William, surcharging the father against the wish of the son, with his proportion of the \$1,401.33, and has also attached the account furnished by William, which he recommends the court to confirm. The auditor awards to William \$868.72. In the account of the latter, furnished by him, and attached to the report, and which the auditor recommends the court to adopt, he only claims \$425.19. If we dismiss the exceptions, and confirm this report, how much will William be entitled to receive? Our only course to avoid the possible complications which may arise in the future, is to set aside the account stated by the auditor as to William F. Milligan, and confirm the account furnished by the latter. So much of the costs as were the result of the improper filing of the accounts and the auditor's fees thereon, should be paid by the accountant. The auditor's fee, earned in this present report, for stating an account to the three minors, should be divided between their estates. The accountant had a right to an audit for his own protection; and those of the wards who did not desire an audit are yet properly chargeable with a proportion of the expenses thereof, unless indeed they are unnecessarily and seriously increased in the interest of one of the parties, which does not appear to be the case here. It was proper that an account should be stated as to all of the children who were of full age, and such was the order of the court.

Isabella Barnes has also filed a number of exceptions; one of which is, that the guardian's account as stated as to her covers the dealings between herself and her father after she came of age.

This exception is well taken. When Mrs. Barnes came of age, the only duty her father (the guardian) had to perform, was to settle with his ward. Any subsequent dealings between them was upon the footing of debtor and creditor, and should not have been included in a guardian's account. The auditor has stated the items separately it is true, but the result has been carried into the guardian's account, and forms part of the balance awarded to Mrs. Barnes. It is no answer to say that this irregularity can do no harm. Every deviation from the law leads to, and may involve the parties in trouble. The practical effect of this is to mingle two distinct claims, the remedy for the recovery of which is different. It affects the rights of the surety by making him responsible for money which he never became security for; and in case of non-payment it might subject the accountant to attachment in the Orphans' Court for an ordinary debt, not collectable in that way.

The fee of the auditor is excepted to by the accountant and by Wm. F. Milligan. It is alleged to be excessive; that there

was but one meeting, and that the auditor neglected to comply with the third rule of court relating to the fees of auditors.

The auditor says in answer to these exceptions, that there were numerous meetings held during a period of twenty months; and asks the court to fix whatever fee the labor of the audit may seem to warrant.

This report is made in pursuance of an order of this court, dated the 16th of February, 1871. The auditor evidently refers to his prior report when he says, the meetings covered a period of twenty months. We are dealing now only with this report. The costs of the prior audit, which was an abortive proceeding from its inception, cannot be charged to the estates of these minors.

The auditor by his silence admits that he did not comply with section eight of the third rule of court, in fixing the amount of his fee. And what is of still more importance, he has paid no regard to the act of Assembly of 14th of April, 1870, P. L. 1158, regulating the fees of auditors. It is possible he may have thought this case did not come within the act of Assembly, for the reason that his appointment was prior to the passage of said act. So far as we propose to allow fees in this report, however, it is only for services performed since the passage of the act.

We propose to enforce both the rule of court and the act of Assembly rigidly in all cases brought to our notice by exception. This can be done without in any way interfering with the allowance of proper compensation in cases, in which, by reason of their importance, and the time consumed in their consideration, the maximum fee fixed by law is insufficient. The bar will always find the court ready to deal justly in such matters. But for the same reason we must enforce our own rules and the law of the land.

As the case stands at present, the auditor is not entitled to compensation, for the reason that he has not complied with the rule of court. As, however, the report must go back to him, we direct him to strike out so much of his charge for fees as relates to his first report; and if upon the coming in of his subsequent report, his charge for his services upon this report is made in compliance with the rule of court and the act of Assembly, we will allow it.

The first and third exceptions filed by Geo. A. Milligan are sustained. The second is dismissed.

The first exception filed by Wm. F. Milligan is dismissed, and the second exception is sustained.

The first, second, fifth and sixth exceptions filed by Isabella Barnes are sustained. The third and fourth exceptions are dismissed.

The account is referred back to the auditor, with instructions to amend his report in accordance with the views indicated in this opinion.

[Legal Gazette, June 30, 1871, Vol. 3, p. 202.]

Orphans' Court, Philadelphia County.

CRAMP'S ESTATE.

Where a citation has been issued to show cause why the confirmation of an auditor's report should not be set aside, and report be recommitted without a formal petition, the court will quash it of its own motion as irregular.

Opinion by PAXSON, J. Delivered June 24th, 1871.

This was a citation upon the administrators of the estate of Jacob Cramp, deceased, to show cause why the confirmation of the report of the auditor in the above estate should not be set aside, and the said report recommitted to the auditor.

This case comes before us in a very informal way. No petition was filed by the complainant. The citation appears to have been issued only upon an affidavit of sixteen lines, setting forth briefly the fact upon which the complainant relies. There being no petition, there is no prayer for relief of any kind.

While we may dispense with forms to a reasonable extent, the manner of proceeding adopted in this case does not commend itself to our judgment. It is certainly not too much in so grave a proceeding as an attempt to set aside the confirmation of an auditor's report, where, as in this case, the entire estate has been distributed under a solemn decree of this court, to require the complainant to file a petition setting forth fully and distinctly the facts upon which he claims such extraordinary relief. The accountant is entitled to have such a specific statement of the claim as will enable him to meet and answer it fully: and thus an issue may be raised in an orderly manner.

The accountants have waived objection to the proceedings upon this ground, by putting in an answer. We do not care, however, even impliedly, to sanction such a loose practice; and we accordingly quash this citation of our own motion. We do so without prejudice to the right of the complainant to commence his proceeding *de novo*. Citation quashed.

[Legal Gazette, June 30, 1871, Vol. 3, p. 203.]

Register's Court, Philadelphia County.

SMYTH'S ESTATE.

1. The contract of marriage may be proved by reputation and cohabitation, but where either fails, the presumption cannot be built on the other.
2. It will require a very clear case to revoke letters of administration granted on a decedent's estate, in favor of the issue of the marriage.

Appeal from the decree of the register.

Opinion by PAXSON, J. Delivered June 24th, 1871.

Bartholomew Smyth died on the third day of August, A. D. 1870, and on the next day letters of administration were granted by the register to one Michael Cavill, a nephew by marriage of the decedent. On the 15th of September following, Ann Schellenger (late Ann Smyth) presented her petition to the register, alleging that she is the only child of the said Bartholomew Smyth, and entitled to letters of administration upon this estate. Upon this petition a citation was awarded requiring the said Michael Cavill to show cause why the letters of administration granted to him should not be revoked. The register, after hearing a large amount of testimony on both sides, revoked the letters granted to Cavill. The former appealed from this decree, and the correctness of this decision is now for our determination.

Ann Schellenger, who now claims to be the daughter and heir-at-law of Bartholomew Smyth, is a married woman, about thirty-eight years of age. She alleges that her mother was married to Mr. Smyth, and that she is the only child of that marriage. Mrs. Smyth died in 1866. There was no evidence of a marriage in fact between the parties, but a number of witnesses were called to prove cohabitation and reputation. The undertaker stated that Mr. Smyth gave the order for the funeral of Mrs. Smyth, paid the expense thereof, and spoke of her as his wife. Mrs. Schellenger's husband says that Mr. Smyth acknowledged Mrs. Smyth as his wife, and so do some other of the witnesses. Several of the latter speak of cohabitation up to the time of Mrs. Smyth's death, and refer to the different houses in which they resided, &c. Their testimony, standing alone, would make out a very strong case of cohabitation; but unfortunately for this view, Mrs. Schellenger herself was examined in her own behalf, and she utterly destroys this theory. She says distinctly that for the last thirty years there was not cohabitation. Mr. Smyth visited them occasionally, it is true, but he did not remain all night. As Mrs. Schellenger had better means of knowledge than the witnesses whom she called, and as she was examined as a witness in her own interest, we must take her testimony upon this point most

strongly against herself, and it completely overthrows the story of the witnesses whom she called to prove cohabitation. She did not even allege that Mr. Smyth supported herself and mother. The most he did was to contribute to their support. Sometimes he paid their rent and sometimes he did not, with occasional aid for household expenses. During all this time Mr. Smyth was a boarder, passing among his relatives and acquaintances as a bachelor. This alleged daughter visited him frequently at his boarding house, and it is significant that, upon her own showing, she never inquired for him at his boarding house as her father, or addressed him in that capacity. She spoke of him, and to him, as Mr. Smyth. Mrs. Schellenger speaks of several letters from Mr. Smyth to her mother, but only one was produced, written upon a small scrap of paper, apparently torn from a larger piece. It is dated June 4th, 1858, and commences with: "Dear wife and daughter." Beyond this it has no address, and is signed "Your husband, Barth. Smyth." A comparison of this letter with other papers in evidence, and which were admitted to be in the handwriting of Mr. Smyth, raises serious doubts as to the genuineness of the former. It is hardly possible that they were written by the same hand. As a matter of evidence I regard the letter as of no weight whatever; in fact, it detracts from the strength of Mrs. Schellenger's case.

During all the time, when some of the witnesses allege Mr. Smyth was living with the alleged wife, it is clearly established that he was a boarder. As before stated, he passed as a single man. He is traced from one boarding house to another, and was shown to be a temperate, frugal man of industrious habits, spending his evenings and nights, with very rare exceptions, at his home. Repeated declarations are established to the effect that he was a single man, and his reasons are given for not having married. His attentions to other women with a view to marriage, were also shown, and, in one instance, an offer of marriage. In the latter case, the offer was pressed with great earnestness, accompanied with a proposition to settle \$5,000 upon the female. She was not satisfied with the amount, and he then stated to her that he had *natural ties* which would prevent his doing more until after his death. This is possibly the key to the whole case. There can be no doubt that Mrs. Schellenger was a daughter of Mr. Smyth; and this is strengthened by the fact that in 1866 he made her a deed for the house in which she lived. This was immediately after the death of her mother. The consideration named in the deed was one dollar. The conduct of Mr. Smyth was not that of a husband and father providing for a family recognized by him as such, but rather that of a man who felt that they had claims upon him of a peculiar

character which he could not entirely ignore, and yet which never induced him to do more than to contribute sparingly to their support.

The case does not at all resemble *Vincent's Appeal*, 10 P. F. S., cited by the appellee. In that case there was clear evidence of cohabitation.—De Amarelli leading a "double life," as it was called—spending his Sundays, and a part of each week with his wife at their boarding house, and the balance of the week at his former boarding house. There were numerous letters from him to his wife, breathing the warmest and most devoted affection. Then there was his endorsement upon the back of the certificate, that it was their marriage certificate. Although the marriage certificate was spurious, the endorsement was genuine and in his own handwriting. While leading a "double life," as it was called, more than half of it was passed with his wife at their boarding-house, and while there she was openly acknowledged as his wife. In this case there was no "double life." There was no motive for it as there was in *De Amarelli's* case. Here there was no difference in rank, and none of the other special circumstances which are referred to in *Vincent's Appeal*. Had the tie between these parties been a legal one, there seems no sufficient reason why they should not have lived together as man and wife. The evidence fails to show a cause to justify a separation continuing without intermission.

- There being no evidence of a marriage in fact, it follows that the appellee must show cohabitation and reputation in order to establish her claim. The rule is thus stated in *Com. v. Stump*, 3 P. F. S. 132: "Reputation and cohabitation at best are only presumptive proofs, and when either of these grounds fail, the court shall not allow the presumption of marriage to be built upon the other."

The application of the above rule of law to the facts of this case leads us to the conclusion, that while there is very considerable evidence tending to establish the legitimacy of Mrs. Schellenger, it is nevertheless not of such convincing character as to require that the letters of administration heretofore granted upon this estate should be vacated in her favor, as daughter and heir-at-law of the decedent. This is all we now decide, as we prefer not to prejudice her claim before the auditor. It may be that she may obtain such additional testimony as will ultimately establish her rights as heir-at-law of Mr. Smyth. But for the purposes of this application we think the evidence is not sufficient.

The appeal is sustained.

E. C. Quin and Chas. Gilpin, Esqs., for appellants.

F. S. Cantrell, Esq., contra.

[*Legal Gazette*, June 30, 1871, Vol. 3, p. 122.]

Supreme Court of Pennsylvania.

AT NISI PRIUS. IN EQUITY.

WHEELER v. RICE et al.*

1. Where a bill has been filed against certain commissioners to restrain them from acting, on the ground that the act creating them is unconstitutional, and said bill has been dismissed, in an opinion pronouncing the act constitutional, the court will not entertain another bill filed alleging the same thing for another reason, the question being *res adjudicata*.
2. Where work has been commenced on a public building, the act of 1846 ousts the jurisdiction of chancery until the decision of a common law court, and this whether there is any question of title or damages involved or not.

Opinion by THOMPSON, C. J. Delivered June 23d, 1871.

The bill in this case prays an injunction to restrain the defendants, commissioners, from proceeding under the act appointing them to erect the public buildings mentioned in the act, as it is alleged in the 12th section of the bill, "they have begun to do." The complainants are tax payers and citizens of Philadelphia, and interfere because of the increased taxes they will, as they allege, be obliged to pay, if the buildings are erected. The ground of their application is that the act of Assembly of August 5th, 1870, under which public buildings are authorized to be erected by the commissioners, is unconstitutional and void. Several reasons for this are set forth in the bill.

The point of unconstitutionality of the act was made by a bill filed by tax payers and citizens of the city against the commissioners on the 3d December, 1870, and was heard before all the judges at nisi prius, on the 4th, 5th, and 6th January 1871. The unanimous opinion of the court was delivered by Read, J., on the 18th of the same month, 13th P. F. Smith, 489, pronouncing the act constitutional, and overruling that and other causes insisted on as grounds for injunction. That judgment so far, I learn, has been acquiesced in; I regard the question of constitutionality of the act, therefore, as *res adjudicata*. Until that decision is changed by the authority which made it, and it was virtually the decision of the court in banc, although technically at nisi prius, I must treat as a decision pronounced upon a consideration of every argument and reason which existed and could then have been advanced against the act. The reasons given now against its constitutionality existed then, and in presumption of law, were then considered and held insufficient. A different rule would lead to anomalous results not to be allowed for a moment. An act would be constitutional, dependent on whether all the grounds or reasons were or were not given, which might have been given on the argument on which the decision should be made. That would not

do as a reason for disregarding the action of the court in the last resort by an inferior tribunal. It is bound by the judgment of constitutionality pronounced by the highest authority until that authority corrects its own error, if any, or changes its decision. That is the situation of this court in this case. All the judges declared the act in question constitutional in the decision referred to; that decision binds me in this case as effectually as if technically in the Supreme Court, as it virtually was.

But even if this were entirely out of the way, and there were reasons sufficient to authorize an injunction to issue in ordinary cases, which I do not say is the case, the first and only section of the act of 8th April, 1846, deprives me, I think, of jurisdiction to grant an injunction in this case. It provides "that no courts within the city and county of Philadelphia, *shall exercise the power of a court of chancery in granting or continuing injunctions against the erection or use of any public works of any kind, erected or in progress of erection, under the authority of an act of the Legislature, until the questions of title and damages shall be submitted and finally decided by a common law court; and in such cases the court shall have authority to issue a venire for the summoning of a jury to the sheriff of an adjoining county.*" P. L. 1846, p. 272.

It is admitted, as already remarked in the plaintiff's bill, that the work towards the erection of these buildings had been begun before filing the bill, and that fully accords with the affidavits of the defendants. It matters not that comparatively little had been done. The first stroke of the axe or the pick, with a view to the erection of the buildings, brings their case within the provisions of the act, which forbids an injunction, in the first instance. It is obviously not the amount of the work done or progress made in the erection of buildings which *ousts* the jurisdiction in chancery. It is, as the act plainly shows, the fact of being in progress of erection which is to have that effect. *Woelbert v. The City*, 12 Wr. 439; *Flanagan v. The City*, a recent case before Sharswood, J., at nisi prius, arising out of the Penrose Ferry Bridge over the Schuylkill.

The fact being found that work had been commenced towards the erection of the buildings authorized by the act of 1870, before this bill was filed, it follows that no injunction can be granted to stop its progress until a resort has been had to a common law court, as provided by the act of 1846. Till then jurisdiction in chancery is suspended, at least. What may be done after that resort I am not prepared to say. For the wisdom of the Legislature the courts are not responsible. *Ha lex scripta est* is a controlling maxim, and it must be obeyed. I confess myself at a loss to understand the purpose for which the

act of 1846 was passed, unless to prevent injunctions in every case of public buildings. If it should turn out in any case, as it probably would in this, that no dispute about title or damages to be assessed would arise, would the proceedings fall, or revert to equity jurisdiction? This is one of the problems connected with the act which I am not able to solve, but which will not for that reason allow me to disregard the positive prohibition "that no court in the city and county of Philadelphia shall exercise the power of a court of chancery in granting injunctions against the erection or use of any public works of any kind, * * * until the questions of title and damages shall be submitted and finally decided by a common law court." This strikes down the power in chancery in this case. I can make nothing else of it. But I need not enlarge. I regard either of the foregoing reasons sufficient to prevent me from granting the preliminary injunction asked for in this case.

Preliminary injunction refused.

[Legal Gazette, June 30, 1871, Vol. 3, p. 204.]

Supreme Court of Pennsylvania.

AT NISI PRIUS. IN EQUITY.

DANZEISEN v. MILLER.

1. An account should not be decreed unless the right to it is clear; a decree dismissing the bill may be appealed from, but one ordering an account puts the parties to great expense and without a chance for a rehearing.
2. To establish a trust in land by parol, since the act of 1856, the plaintiff must show fraud in the first taking of the title; to allow evidence of a fraud committed afterwards would be but an evasion of the statute.
3. One who takes a conveyance upon consideration of his paying certain debts of the vendor, and who complies with his bargain, stands on the same footing with one who pays down an equal amount of cash.

Sur exceptions to master's report.

Opinion by SHARSWOOD, J. Delivered April 29th, 1871.

I am by no means so clear as to either the facts or the law of this case, as to justify me in sending these parties to a long and expensive account before it is finally settled that there is a liability to account. Upon this principle I invariably act in this place. A decree for an account is interlocutory, and not the subject of appeal, while the whole question can be carried up and finally settled by a decree dismissing the bill.

The law is very clearly laid down in *Barnet v. Dougherty*, 8 Casey, 371, that since the act of April 22d, 1856, Pamph. L. 583, a trust by implication or construction of law is raised only from fraud in obtaining the title or from payment of the pur-

chase money when the title is acquired; a subsequent payment of the purchase money, or a subsequent fraud is not sufficient.

Mr. Justice Strong said: "It is fraud in the purchase which makes the holder of the title a trustee. Subsequent fraud, if any exist, no more raises a trust than does subsequent payment of the purchase money." He adds: "Of course setting up the sheriff's deed as an absolute conveyance of both legal and equitable interest, was not a fraud from which the law implies a trust. It was nothing more than a violation of an alleged promise, either implied or express, which is of no avail to induce a chancellor to decree the purchaser to be a trustee." I do not understand *Bugh v. Wintz*, 5 P. F. Smith, 869 as laying down any other rule. Mr. Justice Agnew says: "The trust in such cases arises *ex maleficio*, on the principle that equity will not permit one to deprive another of a title he actually has, by such a promise not intended to be performed." There must be some evidence of fraud in the purchase or that the party obtained the title on a promise which he did not intend to perform. To hold that wherever a deed is made by one man to another upon a parol promise to hold it for the benefit of the grantor and to re-convey it—the subsequent breach of that promise is evidence of original fraud in the purchase—would be most effectually to repeal the fourth section of the act of 1856.

Now upon the facts of this case I have very great doubt whether there is anything more established than a subsequent breach of a parol agreement when A. C. Miller took the title for these lots. It is to be observed that the conveyance was upon the consideration that Miller undertook to pay Danzeisen's debts to the extent of the agreed price. No evidence was given to show that \$5,000 was not a fair price. It does clearly appear from the plaintiff's own examination, that Miller did pay \$3,611.48 of his debts; and the property was subject to two building association mortgages of \$1,000 each. One of them was said to have pretty near run out. The other, I infer, from nothing having been said, was new. Now it may be conceded that at the time of the transaction Miller made to Danzeisen the promise that when he was reimbursed what he undertook to pay of debts and incumbrances he would reconvey. There is not a syllable in the proof to show that there was any relation of debtor or creditor created by this agreement; that Miller was to make advances to Danzeisen and hold the property as security. If the property had turned out to be an insufficient security, Miller could not have recovered the money of Danzeisen. The bill is not indeed framed upon any such idea. It is not a bill to redeem a mortgage, but to establish a trust. If this were all, it must be admitted, I think, that the case

would be entirely bald of any evidence to establish a trust *ex maleficio*.

There is indeed some evidence upon which my mind has hesitated, as to whether Miller did not represent to Danzeisen and his wife, that the deed executed by them was a deed of trust. The witnesses appear to use this phrase without any clear idea of its meaning. There was no evidence of what occurred at the execution of the deed to contradict what appears on its face. The conveyancer, who was one of the subscribing witnesses, was examined. He could not recall the particular circumstances of the execution of this deed, but he states that his invariable rule was, especially when the parties could not read, to be satisfied that they understood what they were doing, and that his partner, since deceased, understood the German language, the plaintiff being a German and having an imperfect knowledge of English. An alderman, of very high character as a gentleman of intelligence and integrity, certifies that the contents of the deed were made known to Mrs. Danzeisen. How much her testimony on the subject is to be relied on may be gathered from the fact that she denies having acknowledged the deed before an alderman at all. Had the deed been without consideration there might be very strong reasons for holding the evidence sufficient to show that the grantors executed the deed upon the false representation that it was a deed of trust, but in the face of the admitted and indisputable fact that the grantee assumed to pay debts of the grantor to the full amount, or very near the full amount, of the consideration named in the deed, and that he faithfully fulfilled that undertaking, and that Danzeisen has never been called upon for any of those debts, it seems to me that it would be very dangerous to hold that a trust *ex maleficio* can be established by the loose kind of testimony given in this case. Had Mr. Miller paid down to Danzeisen the five thousand dollars in cash, it could not have been any stronger.

I say nothing of the limitation of five years by the sixth section of the act of 1856, and of the question whether it was not incumbent on the plaintiff to show that the alleged fraud had not been discovered until within five years of the filing of the bill.

The bill dismissed with costs.

[Legal Gazette, July 7, 1871, Vol. 3, p. 213.]

District Court, Philadelphia County.

COCHRAN v. GARRETTSON.

1. The powers conferred upon *femes covert* to become *feme sole* traders are given by the acts of 1718, and 1855, and only for the purposes mentioned in the former act, *i.e.*, to enable the wife to support herself and family, and the liability to suit is governed by the same rule.
2. A *feme covert* engaged in the profession of an actress has no power to become surety for the rent on a lease of a theatre to her employer; it not appearing that such an act was necessary to the prosecution of her profession.

Sur rule for a new trial.

Opinion by LYND, J. Delivered July 1st, 1871.

The defendant, a married woman, whose husband had abandoned her, became surety in a lease, and the question presented is, has a *feme sole* trader capacity to become surety?

It may be premised that there is no *feme sole* trading in Pennsylvania, except such as is provided for by the statutes of 1718 and 1855; the custom of London has no relevancy. *Jacobs v. Featherstone*, 6 W. & S. 348.

It is also to be remarked that the question is not as to the conditions under which a *feme covert* may exercise the privileges of a *feme sole* trader, but is as to the extent of those privileges; and this *extent* must obviously depend upon the purpose for which they are granted.

Again, this purpose is discoverable exclusively from the act of 1718, as the act of 1855 merely multiplies the conditions under which, without adding to the purposes for which *feme sole* trading may be exercised.

What then was the object for which *feme sole* trading privileges were conferred by the act of 1718? From the face of the act this will admit of very little elaboration. It is expressly stated to be for wives left at *shop keeping* or left to work for *their livelihood* at any *other trade*. It is self-evident that the purpose of granting the privilege is to enable a wife by working at shop keeping or some other trade, to acquire the means of self-support. The liability to suit imposed upon them by the act, though in unqualified terms, must be construed in subservience to the intent. Unless the liability accrued in the course of, and for the necessary purposes of the trade engaged in by the wife for her livelihood, it is not within the purview of the act.

The authorities upon the doctrine of *feme sole* trading are very meagre, and none of them directly in point. They tend, however, to sustain this view of the question. In *Burk v. Winckle*, 2 S. & R. 190, the defendant was sued by her apprentice for a breach of the covenants contained in the indentures of

apprenticeship, and she denied her liability on the ground that the *feme sole* trader could not bind herself by an instrument under seal.

The court decided that her liability did not depend upon the form of the obligation. If the debt was incurred in supporting her family and in carrying on her business, the plaintiff could recover, whether it was by simple contract or by specialty.

In *Jacobs v. Featherstone*, 6 W. & S. 349, it is said "The framers of it" (the act of 1718) "had in view the case of a wife left to *shift for herself* by a husband gone to sea."

The result of these views is adverse to the plaintiff's right of recovery.

The defendant, who was an actress, became security for her employer upon the lease by plaintiff of a theatre to the latter, and the action was brought in consequence of the default of the lessee to pay the rent reserved. It did not appear that the defendant had any interest in the profit of the management, or that it was necessary for the defendant in order to secure employment at the theatre to become surety for the lessee, nor even that it was usual for actresses, in the course of their business, to enter into such undertakings. As far as appears, the act of the defendant was not necessary to the successful prosecution of her profession, and was calculated to diminish rather than to augment her means of living.

We cannot but think that the act of 1718 was intended to relieve a *feme covert* from her disabilities no further than her necessities and the welfare of herself and family would require, and not to give her the uncontrolled power of a *feme sole*.

Rule discharged.

[Legal Gazette, July 14, 1871, Vol. 2, p. 220.]

Orphans' Court, Philadelphia County.

CRESSON'S ESTATE.

A testator devised "all the rest * * of my estate * * I give, devise and bequeath to all my children *who shall then be living*, to hold to them," &c., *Held*:

1. That the word *then* is a relative word and applies to the nearest antecedent unless where such a meaning is clearly incongruous.
2. That the words "I give, devise and bequeath" imply the time of the testator's death, and that the devise in question took effect at that time.

Exceptions to auditor's report.

Opinion by PEIRCE, J. Delivered July 8th, 1871.

The testator, after devising to his wife, Sarah Emlen Cresson, a house in fee in Chestnut street; and for the term of her natural life the house in Arch street in which they dwelt, with

the furniture, utensils, horses, carriages, plate, &c., devised and bequeathed as follows, viz.:

"I give and bequeath to my dear wife, the said Sarah Emlen Cresson, an annuity or sum of four thousand five hundred dollars per annum, to be paid quarterly, out of my estate, during all the term of her natural life, for the comfortable support of herself and the board of our children during their minority."

"All the rest, residue and remainder of my estate, real, personal and mixed, whatsoever and wheresoever, I give, devise and bequeath to all my children, *who shall then be living*, to hold to them, their heirs and assigns, equally to be divided among them, share and share alike, as tenants in common, and not as joint tenants forever."

The will was proved in 1821, and Sarah Emlen Cresson, the widow of the testator, died in 1870, having survived her husband forty-nine years. The testator left surviving him six children, viz.: four sons and two daughters; four of whom are now living, and two of whom died in the lifetime of their mother, leaving children surviving them. The estate of the testator was large; the residue amounting to \$400,000, the most of which had been divided by amicable arrangement among the children whilst they were all living.

The question which arises under this will is to what period of time do the words in the residuary clause devising and bequeathing the remainder of his estate to all his children "*who shall then be living*" refer? There are three periods of time mentioned or referred to in the will to which they may be applicable, viz.:

1. The death of the testator.
2. The termination of the minority of the children.
3. The death of the widow.

The auditor has found that the words refer to the last of these events, the death of the widow.

In reading the will it will be perceived that none of these periods are referred to in express terms, but are only inferable from the use of other terms expressed in the will. Thus the words, "I give, devise and bequeath" imply the death of the testator before the devise or bequeath can take effect. And the words, "for and during all her natural life," imply a termination of that life. And the words "during their minority," imply a termination of the minority.

The word "*then*" is an adverb of time and usually relates to some antecedent period or event. Thus A. devises to B., and on the death of B. *then* to C. The word *then* in that case clearly refers to the death of B. Sometimes it indicates an order or succession of events. Thus a testator bequeaths to his son a

sum of ten thousand dollars, and proceeds by will to say: "Then I give and bequeath a like sum of ten thousand dollars to my daughter." The word *then* in that case indicates an order of giving.

It is one rule of the interpretation of language that the relative word refers to its nearest or immediately preceding antecedent; this rule of course has its qualifications, as where the relative word and the nearest antecedent are so manifestly incongruous that they cannot relate to one another.

To apply this rule to the residuary devise, in this will, it will be perceived that the nearest antecedent to which the word *then* can refer is the devising words, "I give, devise and bequeath," which are immediately followed by the words, "to all my children who shall then be living." When living? If there are no other words to control the intention clearly, when the will and devise are to take effect as a testamentary disposition, to wit, at the death of the testator.

But supposing that these words do not relate to the death of the testator, the next preceding period of time referred to is the minority of the children. Do the words "who shall then be living" relate to this period or the termination of it? The testator had made provision in part at least for his children during their minority, by directing that the annuity of \$4,500 to his wife, should be for the support of herself and the board of the children during their minority. Were the children at the termination of their minority to be cut off from all support until the death of their mother? It will be observed that no provision was made for the clothing or education of the children during their minority by the bequest of the annuity to his wife. It was limited to the support of herself and the board of the children during their minority. It will be remembered also that two of these children were daughters, and little capable, possibly, of providing a maintenance for themselves. Would it then in view of these facts be a safe construction of this devise to say that the testator intended that his children should have no clothing or education during their minority, and that they should not come into possession of the very large residuary estate which he left them until after the death of their mother, and only then contingent on their surviving her? If he meant this, he is supposed to have foreseen the possibility of his wife surviving him nearly half a century; during which time his children would be wholly unprovided for, except for their board during their minority. To give this construction to the will, the words of it should be so direct and decisive, or so clearly referable to no other construction of it, as to enable the court to say with reasonable certainty that this was the intention of the testator.

If the death of the mother was the period of time to which the word *then* refers in the structure of the language of the will, it is the remotest antecedent of the three which have been referred to; and to reach it the construer must pass over the two others which are more nearly proximate to it. In a doubtful case, surely, this is not a reasonable mode of construing the will.

But if all three of these constructions be equally doubtful, what then is the rule of law for construing a devise and bequest of this character?

The law always inclines to treat the whole interest in property as vested and not as contingent, and therefore in cases of doubt, it declares the interest vested. *Lechworth's Appeal*, 6 Casey, 175.

In cases of doubtful construction of wills the law leans in favor of an absolute rather than a defeasible estate; of a vested rather than a contingent one; of the primary rather than the secondary intent; of the first rather than the second taker, as the principal object of the testator's bounty; and of a distribution as nearly conformed to the general rules of inheritance as possible. *Amelia Smith's Appeal*, 11 Harris, 9.

Where the meaning of a devise is uncertain, the law adopts the principles of the intestate law; for whoever claims against the laws of descent must show a satisfactory written title. The rule of equality of descent to relatives of the same degree is so just, that the law adopts it when the law is to govern, and prefers it when the law is called on to interpret. *Lipmann's Appeal*, 6 Casey, 180.

For reasons above given, we think that the remainder of the estate of the testator vested in all his children living at his death, and that the heirs and legal representatives of such of them as are dead are entitled to such share as the deceased children would have taken if living.

The exceptions are sustained and a decree is ordered to be drawn in conformity with this opinion.

Geo. L. Ashmead, Geo. W. Biddle, and S. S. Hollingsworth, Esqs., for distributees.

A. S. Lechworth, Esq., for exceptant.

[Legal Gazette, July 14, 1871, Vol. 2, p. 220.]

Court of Common Pleas, Philadelphia County.

RUSHWORTH et al. v. SWOPE et al.

A claim for exemption under an attachment execution is too late when made on the day of the hearing.

Opinion by PAXSON, J. Delivered July 8th, 1871.

This was a rule to show cause why the defendant should not have his exemption, as against an attachment execution.

The attachment went out upon the 18th of April, returnable to the 25th of same month, between the hours of ten and eleven o'clock A. M. The claim for exemption was made, according to the defendant's own showing, at the alderman's office, prior to the hearing, but on the day thereof, from ten to half past ten. This was practically, a claim at the hearing. It came too late. *Strouss v. Becher*, 8 Wr. 206; *Blair v. Steinman*, 2 P. F. S. 423; *Zimmerman v. Brines*, 14 Wr. 535.

Rule discharged.

[Legal Gazette, July 14, 1871, Vol. 3, p. 221.]

Court of Common Pleas, Philadelphia County.

McCASSEN v. WATERHOUSE.

An appeal otherwise regular will not be stricken off because made by defendant's agent.

Sur rule to strike off appeal.

Opinion by PAXSON, J. Delivered July 8th, 1871.

This appeal is regular upon its face. But the plaintiff alleges the appeal was entered by a brother of defendant, who appeared before the alderman, representing himself as the defendant, and signing the name of the latter to the affidavit. To sustain this, we have only the deposition of the plaintiff, and even he admits that William Waterhouse was in the habit of attending to his brother's business, and signing his name. Conceding the extremely doubtful proposition, that we have the power to strike off an appeal, regular upon its face, and filed within proper time, we could not do it upon this evidence.

Rule discharged.

[Legal Gazette, July 14, 1871, Vol. 3, p. 221.]

District Court, Philadelphia County.

ADLER et al. v. TELLER et al.

1. T. A. & Co. sold goods in December, 1867, to one R., and in January, 1868, dissolved. T. & Bro. succeeded to the business, being composed of the same partners, except one, that formed T. A. & Co., and sold R. more goods. Subsequently he produced a blank note, endorsed by plaintiffs, and filled up the same, in payment of the debt to both firms, to the order of T. A. & Co., and delivered it. The note was protested, and T. & Bro. wrote to plaintiffs demanding payment, which they made. Plaintiffs then sued T. A. & Co. for the amount so paid. *Held:*
2. That presumption was that the note was endorsed by plaintiffs for accommodation of T. A. & Co. At all events, if intended as a guarantee as to them, it could not be proved by parol.
3. That T. & Bro. and T. A. & Co. were distinct firms, and the correspondence between T. & Bro. and plaintiff, created no liability on the part of the latter to the defendants. *Semble*, It would have been otherwise, had plaintiffs known the relation between T. A. & Co. and T. & Bro., and the consideration upon which the note was given.

Sur demurrer to plea.

The declaration was on a promissory note, made by A. Rodelheim to the order of defendants, dated 12th February, 1868, at six months, for \$739.10, and endorsed by them, "by which said endorsement the said defendants thereby then and there ordered and appointed the said sum of money in the said promissory note specified, to be paid to the said plaintiffs, and then and there delivered the said promissory note to the said plaintiffs," &c.

To this the defendants filed the following plea:

"And the defendants, by Moses A. Dropsie, their attorney, say, that prior to the making of the said note, to wit, on December 10th, 1867, the said defendants, Solomon Teller, David Teller, Raphael Teller and Meier Anathan, composed the firm of Teller, Anathan & Company, the interest of each partner in the said firm being one-fourth; that said firm sold to one A. Rodelheim merchandise amounting to the sum of \$927.50. That afterwards, to wit, on January 1st, 1868, the said partnership was dissolved, by the retirement of the said Anathan. The other defendants continued the same business under the firm of Teller Brothers, who settled the business of Teller, Anathan & Company. That the said firm of Teller Bros. sold to said Rodelheim afterwards, to wit, on January 8th, 1868, merchandise to the amount of \$330.75. That afterwards, to wit, on February 8th, 1868, the said Rodelheim settled with the firm of Teller Brothers the said indebtedness, by giving to the said Teller Brothers *inter alia* the said note, being for a balance of \$408.35, due the firm of Teller, Anathan & Company, and a sum of \$330.75, due to Teller Brothers; a paper being a blank form of a promissory note, which bore the endorsement of the said plaintiffs, and thereupon the blanks in the said form were

filled, and the said Rodelheim then signed the said promissory note, and delivered it to the said Teller Brothers, in payment of his aforesaid indebtedness. And thereupon said Teller Brothers retained said note till within a few days of its maturity, and then transmitted the same to Pittsburgh for collection, where the said Rodelheim and the said plaintiffs then resided.

"The said note was not paid at its maturity, and was protested for non-payment, and returned to said Teller Brothers, who thereupon addressed a letter to the said plaintiffs at Pittsburgh apprising them of the protest of said note, and demanding payment thereof. The said plaintiffs immediately replied to the said letter, and requested that the said note be transmitted to Pittsburgh for their inspection, and if found correct they would pay it. And thereupon the said Teller Brothers transmitted said note to Pittsburgh as requested, and the said plaintiffs paid the same.

To this plea plaintiffs demurred.

Opinion by LYND, J. Delivered July 8th, 1871.

Plaintiffs declared upon a promissory note made by one Rodelheim to the order of Teller, Anathan & Co., and by the latter duly endorsed. Defendants filed the following special plea (see above). The question is on plaintiffs' demurrer to this plea.

It is not alleged that the plaintiffs endorsed the note for the accommodation of the maker, and from the fact that it was filled up to the order of the defendants, we must assume that it was endorsed for their accommodation; and as the plaintiffs have paid the note to a subsequent holder, the defendants must reimburse them.

And even if it was alleged that the plaintiffs endorsed the note for the purpose of guaranteeing the payment of it by the maker, to the defendants, they cannot prove such guarantee by parol. *Schafer v. The Bank*, 9 P. F. S. 144.

The correspondence between Teller & Bro. and the plaintiffs does not help Teller, Anathan & Co., the defendants—the two firms are entirely distinct.

If the correspondence had been between the firm defendants and the plaintiffs, or if it had appeared that the plaintiffs knew at the date of their letter that Teller & Bro. had succeeded Teller, Anathan & Co., and that the note in question had been given for the total of the indebtedness of Rodelheim to both firms, the latter would have been *written* evidence of guarantee, and payment of the note in pursuance thereof, would have discharged the defendants.

Judgment for plaintiffs on demurrer to plea.

[Legal Gazette, July 28, 1871, Vol. 3, p. 236.]

Orphans' Court, Philadelphia County.

BUIST'S ESTATE.

1. A testator bequeathed "everything" to his wife for life and at her death to be divided among their children. After his death a posthumous son was born, who survived but a few months and died. The wife took out letters of administration and charged herself with the value of the personal estate, mainly leases and fixtures of brickyards, at \$20,490; the evidence showed that it was worth \$60,000. This estate she sold to her step-brothers for \$30,000, but the guardian of the children having commenced legal proceedings to rescind the sale, the property was reconveyed to her. The profits of the brickyard for the year succeeding the testator's death were \$19,374; on a settlement of the accounts of the administratrix.

Held:

2. That the guardian of the children was not entitled to receive the distributive share of the estate of the posthumous son, but that the same went to his mother, the accountant, under the intestate law.
3. That the expenses incurred for counsel fees, &c., by the guardian in protecting the interest of the remaindermen, the children, should be allowed out of the estate. As far as they came out of their share the allowance would be of course, and as far as they reduced the accountant's life estate, as her act caused them to be incurred, she could not complain.
4. That the accountant was properly surchargeable with \$39,510, the difference between \$20,490, the appraised value of the testator's estate, and \$60,000, the real value thereof.
5. The auditor decided that accountant was entitled to receive for the first year after the testator's death, on account of her life estate, the interest on the principal, and that any earnings over that sum should go to the estate and become part of the principal. Therefore, after deducting \$3,600, the interest at six per cent. on \$60,000, the principal of the estate, from \$19,374, the actual earnings of the brickyards of decedent during the first year, he surcharged the accountant with \$15,774, the difference. *Held:*
6. To be error. The estate having been devised to her for life and she having been charged with the value of it at the time of the death of the decedent, she is entitled to take it at that value and to apply to her own use whatever profits are to be made out of it.
7. That under the act of 17th May, 1871, the accountant was entitled to take the estate upon giving security in such form and amount as the court should direct, to protect the interests of those in remainder.

Sur exceptions to auditor's report.

Opinion by PAXSON, J. Delivered July 8th, 1871.

John M. Buist, the testator, died on the 13th of November, 1868, leaving surviving him a widow, Stella M. Buist, the accountant, and three minor children, Stella, Annie and Jane. One child, John M. Buist, was born after the testator's death, and died on the 29th day of June, 1869, having survived his father about seven months, and leaving no liabilities of any kind. The will of the testator, which was made in the extremity of his last sickness, is as follows:

"I bequeath everything to my wife, during her lifetime, and at her death to be divided among the children; also to take care of Annie Lednum; also Robert Buist, Sr., and Charles E. Wentz, Sr., to be guardians of the children."

On the 18th of November, 1868, letters of administration, with the will annexed, were granted to the testator's father,

Robert Buist, Sr. On the application of the widow, Stella M. Buist, these letters were revoked, and letters of administration, with the will annexed, were, on the 5th of December, 1868 granted to the widow. The latter filed an inventory of the personal estate, consisting chiefly of brickyards, machinery, fixtures and stock on hand of burned and unburned bricks, together with certain leasehold interests in several lots from which the clay to manufacture the bricks was procured. The said inventory amounted to \$20,490. About the first of January, A. D. 1869, the accountant sold the brickyard, leases, machinery and bricks on hand, to her two step-brothers, Charles E. and Henry C. Wentz (the former of whom was one of the testamentary guardians of her children), at private sale, for the sum of \$30,000, taking in payment therefor two mortgages on property in the interior of Pennsylvania, one for \$10,000 and the other for \$20,000; one of which, at least, was not a first lien. On the 10th day of April, A. D. 1869, she filed her account in the office of the register of wills. In the month of June, 1869, Robert Buist, Sr., as guardian and next friend of the children, filed a bill in the Court of Common Pleas, alleging that the sale aforesaid was fraudulent in law and in fact—that the property included therein was worth greatly more than the price at which it was sold. The practical result of this proceeding was that the Messrs. Wentz reconveyed to the widow, as administratrix, the property which they had purchased of her as above stated; and the court ordered her to enter additional security in the register's office, in the sum of \$30,000. The additional security was duly entered.

The auditor finds, from the evidence before him, that the value of the brickyards, leases, machinery, and bricks on hand, at the time of the death of John M. Buist, was at least \$60,000. From this he deducts the amount at which the same was appraised in the inventory, viz.: \$20,490, and surcharges the accountant with the difference, \$39,510.

The auditor also finds that the profits of the brickyard, for the year following Mr. Buist's death, amounted to \$19,374. From this sum he deducts \$3,600, the interest at six per cent., which the estate would have yielded if converted, and which latter sum he awards to the accountant, as tenant for life, and surcharges her with the difference, \$15,774.

These are the only items of surcharge complained of.

The accountant filed a number of exceptions to the report of the auditor, the first of which is to the surcharge of \$39,510. We see nothing in the case to sustain this exception. The auditor finds, as a fact, that the property was worth at least \$60,000 at the time of Mr. Buist's death. The evidence is not before us except in so far as it is incidentally stated by the auditor.

We are unable to see any error in the finding of the auditor upon this point.

The second exception is to the surcharge of \$15,774, the alleged profits of the brickyard for the year 1869.

It will be observed that by the terms of Mr. Buist's will, the corpus of this estate is given to the widow for life, and after her death, to be distributed among her children. As the estate consists entirely of personal property, it is necessary to protect the interests of the remaindermen, who, in this instance, are the minor children of the testator. It was urged on behalf of the latter that inasmuch as much of the value of the estate consisted in leasehold interests in clay lands, to allow the widow to go on and exhaust the clay for her own benefit during her life, or the continuance of the respective leases, would waste the estate to the serious detriment of the children. The auditor says: "It seems to be the very case where, as soon after death as possible, the estate ought to have been converted into such property as, while it would yield an income for the benefit of the life estate, could be transmitted substantially to those whom the testator desired might enjoy it in the future. The late English authorities would seem to establish that, having regard to the time necessary to collect and gather in the estate, and of a reasonable time to convert it, that the owner of a life estate vesting on the death of a testator, is entitled for a year thereafter, to receive that which the estate would have yielded if converted and invested during that year. This doctrine is found established in 2d Spence's Equity, 564, 5, 6 and 7, and the cases therein referred to, especially in *Dimes v. Scott*, 4 Russell, 209; *Taylor v. Clark*, 1 Hare, 161. This estate, your auditor has already declared, from the evidence already before him, was worth, at the time of the testator's death, not less than \$60,000. This, if invested, would have yielded at the end of the year 1869, at six per cent., \$3,600, and under this view of the law this sum would have been the exclusive property of the tenant for life. The sum earned by this estate, during the year 1869, was, as your auditor has already stated, \$19,374. This sum, less the amount which the tenant for life was entitled to receive, she being the accountant, she is to be surcharged with, to wit, \$15,774." The decision of the auditor goes upon the principle that this being a wasting estate, should have been converted within one year after the death of the testator, and during that year the widow is entitled to so much only of the profits of the estate as the capital would have yielded if converted and placed out at interest. And he charges her with the principal of the estate at its value at the time of the testator's death.

The latter charge is right, as has been already stated. But

why should the bulk of the profits of the estate go to the remaindermen during that year? She is charged with the full amount of the stock, fixtures and good will of the brickyards, together with the value of the leases. If they had been sold at that price to a stranger he would have been entitled to the profits. If she takes them at the valuation and carries on the business herself, why shall not the profits go to her? We have already seen that the corpus of the estate has been given to her by the terms of her husband's will. She has the right to retain and enjoy it, provided the right of those in remainder can be properly protected. To them she must account for the value of the estate at the time of her husband's death, when her rights vested, less whatever liabilities there may be against her husband, and the expenses of administering the estate. There appear to have been few debts, and she filed an account about three months after her husband's death. The auditor has given the profits to those in remainder for the first year, upon the theory that an administrator is entitled to one year in which to settle the estate, and ascertain if there are any debts. This estate was settled in about three months, as before stated. While an executor or administrator is by the law of this State allowed one year within which to settle his account, there is no law to prevent his doing so at an earlier day. No one but a creditor can complain of a settlement within the year. The heirs or distributees cannot do so. In this case, those in remainder cannot suffer for this reason. The risk, and the only risk, is with the accountant.

Here the widow has elected to retain the property bequeathed to her under her husband's will. This, we think, she has a right to do. It vested in her upon her husband's death. She must be charged with its value at that date, less the amount of the debts of the testator proved within one year, and the expenses of the administration. The profits, whatever they may be, belong to her.

The cases of *Dimes v. Scott*, and *Taylor v. Clark*, cited by the auditor, do not sustain the principle which he has adopted. In the former case, the estate was given to trustees, with a positive direction to convert it into money, and invest the proceeds in government or real estate securities—the interest to be paid to the widow for life, with remainder over. A portion of the estate was invested in Indian loan, at the time of the testator's death. The trustees neglected to convert it, and paid the income (ten per cent.) to the widow. It was held she was only entitled to receive the income the estate would have yielded if it had been converted in accordance with the directions in the will. In *Taylor v. Clark*, there was also a positive direction to convert. A considerable portion of the estate was invested

in a partnership, the proceeds of which were payable by instalments. Held, that the widow, who had a life estate only, was not entitled during the first year, to the profits of the business, but only to so much as the estate would have yielded if converted. It will be observed these cases are entirely different from the one under consideration. Here the estate is given to the widow. If entitled to the principal, she is also entitled to the profits.

The third exception is not sustained. The accountant is not entitled to the whole estate absolutely, but only to a life interest, with remainder to her children. The rights of the latter must be protected.

The fourth exception is, "that the auditor erred in not awarding her the whole estate at its value at the death of John M. Buist, upon her entering security, to be approved by the court, for the benefit of those entitled as remaindermen."

The act of 24th of February, 1833, § 49 (Purdon, 304, pl. 184), provides that: "Whenever personal property is bequeathed to any person for life, or for a term of years, or for any other limited period, or upon a condition or contingency, the executor of such will shall not be compelled to pay or deliver the property, so bequeathed, to the person so entitled, until security be given in the Orphans' Court having jurisdiction of his accounts, in such sum and form as, in the judgment of such court, shall sufficiently secure the interest of the person entitled in remainder, whenever the same shall accrue or vest in possession."

This enabled the executor to demand security before he paid or delivered personal property bequeathed to a person having only a life interest therein. The act of 17th of May, A. D. 1871, requires the executor or administrator to deliver such property to the life tenant, upon the entry of satisfactory security by the latter. Said act is as follows: "Whenever any personal property, or the increase, profits or dividends thereof, has been or shall hereafter be bequeathed to any person, for life or for a term of years, or for any other limited period, or upon a condition or contingency, the executor or executors, administrator with the will annexed, or trustee or trustees under such will, as the case may be, shall deliver the property so bequeathed to the person entitled thereto, upon such person giving security, in the Orphans' Court having jurisdiction of the accounts, in such form and amount as, in the judgment of the court, will sufficiently secure the interest of the person or persons entitled in remainder, whenever the same shall accrue or vest in possession; and any married woman availing herself of the benefit of this act shall have power, as a *feme sole*, to bind her separate estate and property, by any obligation given by her, as security, under this act." Page 62 of General Laws of session of 1871.

If a life interest in the personal estate of Mr. Buist had been bequeathed to some one other than the accountant, she would have been compelled, under this act, to pay or deliver it to such person upon a compliance with the terms of said act. As it has been bequeathed to her, she is entitled to retain it upon entering into such security as the court may approve, and which must be sufficient fully to protect the interests of those in remainder.

The fifth and sixth exceptions are sustained, for reasons which have already been stated in this opinion in the discussion of the prior exceptions.

The accountant excepts (seventh) because the auditor has not allowed her five per cent. commission on the gross value of the estate. On the other hand, Robert Buist, Sr., as guardian, excepts to any allowance of commissions, on the ground that the accountant has wasted and mismanaged the estate. The auditor allowed two and a half per cent. commissions on the gross estate.

We dismiss both these exceptions. While we would not allow more than two and a half per cent., in view of the size of the estate; that there were very few debts, and that the accountant retains the estate in her own hands; we yet do not see such evidence of waste and mismanagement as would justify us in disallowing commissions altogether. There is no evidence of any loss to the estate by reason of any act of the accountant; nor are we prepared to say that the sale to her step-brothers was with any fraudulent intent. It may have been the result of ignorance or inexperience; at any rate the arrangement was promptly rescinded when its impropriety was made apparent.

We see nothing to sustain the ninth exception. The claim of R. Buist, Sr., appears to have been fully made out before the auditor, and no sufficient reason has been urged why it should have been disallowed.

The ninth and last exception filed by the accountant is to the allowance by the auditor of the sum of \$420.10 to Robert Buist, Sr., as guardian, for expenses paid by him in the legal proceedings referred to, which, as before stated, resulted in the reconveyance to the accountant of the brickyard and fixtures, and the entry, by order of the court, of additional security by said accountant; as well as to the large surcharge above referred to.

The guardian stepped in to protect the interest of his wards. He has no estate belonging to them in his hands with which to defray these expenses. They receive no part of the estate until the death of their mother. As the act of the guardian seems to have been a proper one—resulting in benefit to the whole estate, there would appear to be no good reason why he should

not be allowed these expenses. So far as it affects the remaindermen it is clearly right; so far as it affects the accountant and diminishes her life interest, it is proper to allow it, for the reason that it was her conduct which rendered such action on the part of the guardian necessary.

Robert Buist, guardian, has also filed exceptions. The third relating to the commissions, has already been disposed of. The first was withdrawn upon the argument.

The second is sustained, unless the said Stella M. Buist will, within ten days from this date, execute and place on record in the proper office, a formal declaration of trust in favor of the estate, in regard to the property referred to in said exception.

We sustain the fourth of said exceptions as to the disallowance of the claim of the guardian for an allowance of \$2,500, as counsel fees in protecting the rights of his wards. This claim rests upon precisely the same principles as the claim for expenses allowed by the auditor. The auditor admits the claim to be a reasonable one so far as the amount is concerned, and there seems to have been no objection to it upon that account; but he thinks the guardian must look to his wards' estate. The only estate they have is their said interest in remainder, and it must come out of that if it is paid at all. The accountant is the only person who can object, and we do not think she can do so successfully, for the reasons heretofore stated. The remainder of this exception was withdrawn.

The guardian excepts fifth and lastly, because the auditor has awarded the sum of \$23,492.65 to the accountant as next of kin of John M. Buist, minor child of the testator, which child died since the decease of its father, instead of awarding the same to the guardians of said minor.

There can be no such thing as a guardian of a dead child. That relation ceases with the death of the latter? Money due the minor, and not received by the guardian prior to the death of the former, goes to his legal representatives. Nor is there any force in the argument, pressed upon the hearing, that the share of the minor, inherited by the mother, escapes its proportion of the costs and expenses incurred by the guardian in asserting the rights of the minors. These expenses are deducted from the gross estate, and the share of the deceased minor is reduced proportionably.

The first, third, seventh, eighth and ninth exceptions filed by Stella M. Buist, administratrix, are dismissed. The second, fourth, fifth and sixth of said exceptions are sustained.

The first, third and fifth exceptions filed by Robert Buist, Sr., guardian, are dismissed.

The second of said exceptions is sustained, unless, within ten

days, a declaration of trust is made and recorded, as before stated.

The third of said exceptions is sustained, as to the sum of \$2,500 for counsel fees.

The report is recommitted to the auditor, with directions to amend his report in accordance with the views indicated in this opinion.

[Legal Gazette, July 28, 1871, Vol. 3, p. 236.]

Court of Quarter Sessions, Philadelphia County.

COMMONWEALTH v. ATKINSON.

1. An indenture of apprenticeship should be signed by the master, the apprentice, and his parent, guardian, or next friend. The guardian can only sign if there is no parent, and the next friend only where there is neither parent nor guardian.
2. No formal appointment is necessary to constitute "a next friend," but he should be one who by his age, condition and conduct, gives evidence of a proper discretion, and more than ordinary interest in the welfare of the minor.
3. An indenture of apprenticeship, which does not provide for the support of the minor during the whole and every part of the time which he has to serve; which does not provide for the schooling of the apprentice, and while signed by one as "next friend," discloses on its face that the parent is living, is fatally defective in these three particulars.
4. Where an apprentice absconds, or the master ill treats him, the proper proceeding is by arrest, and binding over or commitment by a justice of the peace. Where the indenture is itself intrinsically defective, a writ of *habeas corpus* is the proper method of bringing the question before the court for adjudication.

Sur *habeas corpus*.

Opinion by FINLETTER, J. Delivered July 15th, 1871.

On the 14th day of December, A. D. 1868, John Nipple, by and with the consent of John C. Atkinson, a son and partner in business with Joseph Atkinson, the master in this case, as "nearest friend," was indentured to Joseph Atkinson, to learn the trade of bricklaying. The master covenanted to teach him the trade of bricklaying, and also to procure and provide for him sufficient meat, drink, lodging and washing fitting for an apprentice during the said term, &c., "that is to say, nine months out of the year, from the first day of April until the first day of January in each year of his term, and from the first day of January until the first day of April, he is to board at his home. I will also give him forty dollars per year in lieu of clothing during said term."

At the time of the binding, the boy had absconded from the home of his parents, by whom he was advertised in the daily papers, at the time.

On the first day of January, A. D. 1871, the apprentice, by the articles of indenture, left the employment of his master,

and did not return on the first day of April, and was subsequently arrested and committed to prison as an absconding apprentice, whereupon his father sued out this writ of *habeas corpus*. It is important that proceedings of this character should be in accordance with the act of Assembly of 1770 and its supplements, and the decisions thereon, and although the parties have expressed their consent and desire that the case should be determined upon its merits, without regard to the manner in which it is presented to the court, I consider it proper to ascertain the precise form in which all such cases should be brought for final adjudication.

Whenever either the master or the apprentice have violated the covenant of the indenture, or "whenever the master shall misuse, abuse, or evilly treat," or where the apprentice shall abscond, the party aggrieved shall or may apply to a justice of the peace, who, after giving notice to such master or apprentice, if he or she shall neglect to appear, shall issue his warrant, and bind him or her over to appear at the next Court of Quarter Sessions, or commit such apprentice, for want of security, to jail, and upon such appearance of the parties, and hearing their respective proofs and allegations, the said court are authorized, if they see cause, to discharge the said apprentice from his apprenticeship, and of and from all and every the covenants of the indenture, or to imprison him.

Nothing more than the appearance at the next court, of the party held, is necessary to make a matter of this kind ripe for adjudication. Where, however, the apprentice, or his parent, or guardian desires to take advantage of a defect in the indenture, or some intrinsic matter other than that mentioned in the act, the remedy is by writ of *habeas corpus*. 1 S. & R. 36; 8 W. & S. 340; 2 Barr, 402.

The binding must be to serve as an apprentice to some art, mystery, occupation, or labor, and an indenture which does not set out this object is void. 2 Dallas, 198. The signature of the apprentice is absolutely necessary, and his parent, guardian, or next friend, must show his assent thereto, by his signature at the time of the binding. The right of the guardian to assent arises only when there is no parent, and of the next friend only when there is neither parent nor guardian. Parents or guardians may forfeit their rights by abandonment, or by a condition such as confirmed drunkenness, which unfits them to exercise the care and discretion the law requires.

The next friend requires no formal appointment. He must, however, have evinced, by his regard for the minor, a more than ordinary care and interest in his welfare, and by his age, condition, and conduct, give evidence of a proper discretion, and not as in this case, be only a mere acquaintance of the

minor, and a son and copartner with the master, and as in this case, covenant for the minor to live "home" for three months in the year, which is a concession, either that the minor had parents or guardian, or that he had others more nearly related or connected with him, to stand as his next friend. The interest of the apprentice is of paramount importance, and the indenture itself may, without more, be evidence sufficient, that the person assenting and signing as "next friend," has no right to be so regarded, and show that the apprentice should be relieved from an improvident or oppressive binding. The next friend must have no interest against the interest of the apprentice, and certainly none in the business or enterprise in which he is employed by the master. Being *in loco parentis*, he must, by the contract which he is making for his ward, exhibit all a parent's anxiety and vigilance for his present and future welfare; short of this, he cannot be "next friend."

The indenture must show specifically the trade or mystery. It must, moreover, show on the part of the master an obligation to maintain and support the apprentice, not only during the whole term, but during every part of it. It is true, there is in 2 Barr, 402, a case where an indenture which provided for the support of the apprentice during only nine months of the year was sustained, but only upon the ground that the compensation which was given for nine months was adequate to his support during the whole year. Upon what principle could an indenture, which gave no support for any portion of the time, be sustained? It lacks one of the most essential purposes and considerations of such contracts. Whilst it leaves the apprentice free to starve or steal, it forbids him to labor, if he could obtain employment, because it contains his covenant to give all his time, care and labor to the business and interests of his *master*.

In order that the apprentice may become an intelligent workman and citizen, the master must covenant for his schooling. It is now well settled, that without this, the court will cancel an indenture, unless it appear that the apprentice is sufficiently educated and intelligent not to require additional schooling, which has now been regulated by act of Assembly, 17th March, 1865. In the present case, the father of the apprentice was residing in this city, and was not incapable of exercising his right, and had not abandoned his son. The next friend in this case was the son of the master, and was an entire stranger to the minor. The indenture provides for the support of the apprentice during only nine months of the year. It will be seen that this indenture is *void*; it lacks the most important elements to make it a valid instrument.

It is therefore adjudged, ordered and decreed, that the said John Nipple be discharged of and from his apprenticeship, and of and from all and every the articles, covenants and agreements in the said indenture contained, the said indenture with the said Joseph Atkinson to the contrary notwithstanding.

J. C. Redheffer, Esq., for relator.

[Legal Gazette, July 28, 1871, Vol. 3, p. 232.]

Court of Common Pleas, Philadelphia County.

IN EQUITY.

NOBLIT et al. v. BRIGGS et al.

1. Evidence of a parol contract cannot in any way add to, alter or vary the terms of a subsequent written contract covering the same subject matter.
2. Where a sum of money is due and presently payable from one party to another, interest should be charged.

Sur exceptions to master's report.

Opinion by FINLETTER, J. Delivered July, 1871.

The fifth exception of the defendant is, "Because the master has reported in favor of disallowing the charge of \$500 upon the erection of the derrick and engine house."

The written contract, in all its parts and terms, is plain, specific and unambiguous. It is not apparent, therefore, how parol testimony could be admitted to vary its conditions. Even if it were admissible at all it should have been confined to the specific matters which required the elucidation of witnesses. The parol testimony taken by the master was certainly not of this character. It referred especially to the terms of a prior verbal agreement between the parties upon the same subject matter. It merely proved that the verbal differed from the written contract, and nothing more. It did not explain or modify any of the conditions of the written contract, but simply explained how they had been arrived at. It did not and could not aid in the least in their interpretation.

It was, therefore, irregular, and its consideration by the master led him into manifest error against the unmistakable terms of the contract, and against the evident intention of the parties. Following this false light he reports the price to be paid \$4,000, when the first clause of the agreement says: "for the sum or price of \$4,500;" and also finds that to be a loan which the agreement specifies was the first payment to be made after a certain portion of the work had been completed.

Briggs undertook to sink a well "to oil or 1,000 feet," and to provide everything necessary to that end, except the engine,

for the sum of \$4,500. How and when this was to be due and payable clearly appears: "The payments to be made as follows: \$500 as soon as Briggs has erected his derrick, engine, engine house, and is fully prepared and has commenced to bore on said tract, the balance to be paid him as follows: two-thirds of \$300 when he shall have bored a well four and a half or five inches in diameter 100 feet; two-thirds of \$325, when he shall have bored the second 100 feet; two-thirds of \$350 on the third 100 feet; two-thirds of \$375 on the fourth 100 feet; two-thirds of \$400 on the fifth 100 feet, and two-thirds of \$450 to be paid him on each additional 100 feet, after he shall have reached the depth of 500 feet, until he shall have completed his boring or sinking the well to the depth of 1,000 feet. The balance, or one-third, retained on each 100 feet, to be held as a security for the faithful performance of this contract, and not to be paid the said Briggs until the stipulations herein contained shall have been complied with; and it is further agreed that if the said Briggs should fail to sink the well to the depth of 1,000 feet, then in that event all the moneys due upon that contract to be forfeited."

From this it is apparent that two things were contemplated by the parties, distinct in themselves, but necessary to the fulfilment of the object in view. They are the preparations for boring, and the boring. The first to be completed and paid for, before the other was commenced; the second to be paid for as it progressed.

The contingency of a cessation of the work before completion was considered and provided for. "The said party of the first part reserves the right to discontinue boring, and in that event he is to pay to the said Briggs the price per foot herein named for the number of feet bored at the time he directs him to discontinue to work. It is also understood * * * that the well shall not cost the party of the first part more than the sum of \$4,500 if bored to the depth of 1,000 feet, or its *pro rata*, as herein specified."

It is obvious from this that Briggs was to be paid \$500 when prepared to bore, and after he had commenced to bore, a specified sum per foot, which, if the well were completed to oil or 1,000 feet, would amount to \$4,000; if discontinued by direction of Lloyd, "its *pro rata*, as herein specified," in accordance with "the price per foot herein named for the number of feet bored." The "*pro rata*" had reference only to the cost of boring, and does not apply to that portion of the work which would then have been completed and paid for, the erection of the derrick and engine, and engine house.

It was further agreed that "if of a less depth (than 1,000 feet) the setting of the engine, building and furnishing lumber

for derrick and engine house to be and remain the property of the party of the first part without extra charge." Why should he have had the benefit of this stipulation, unless for the reason that he had already paid for these things, and they, of right, belonged to him, even if the well were abandoned? It was to guard against any contingency of claim that they were only to be his when the whole work was completed and the whole sum of \$4,500 paid.

This interpretation is consistent with the terms of the whole contract. Whilst it pays Briggs for all the labor and materials furnished by him, it requires Lloyd to pay no more than he agreed to pay, and permits him to take no portion of Briggs' labor and material without payment.

The master, in his interpretation of the agreement, loses sight of the fact that the erection of the derrick and engine house was a necessary part of the whole work for which the \$4,500 were to be paid. He considers only the boring of the well, and upon this theory bases his calculations, and ascertains that the price to be paid therefor was the sum of \$4,000. He thus excludes from consideration a very essential part of the contract and work completed. Nor has he found a corresponding compensation for him who thus loses the fruits of his bargain, and labor and materials.

By this interpretation, if Lloyd discontinued the work when one foot of the well had been bored, Briggs, for all he had done and furnished, would be entitled to receive the sum of three dollars, for which sum Lloyd would receive the setting of the engine, building and furnishing lumber for derrick, and engine and engine house.

Again, if Lloyd discontinued the work when the well had been sunk 999 feet and 11 inches, Briggs would have been entitled to receive \$3,999.62½. Whereas, if he had continued one inch further, he would have been entitled to receive \$4,500. An interpretation which works such results must be deemed too absurd for serious thought. At all events it should not be regarded for a moment against the express terms of a written contract.

The fifth exception of the defendant is, therefore, sustained.

The seventh exception of the defendant is, because the master has not allowed interest on the amount admitted by him to be due.

Whatever was due to Briggs when the work was discontinued was then ascertainable and was then payable. Interest is the penalty which the law imposes for non-payment. Why, then, should not the master have imposed this penalty? No reason has been given in his report, and we can find none in the circumstances of the case.

This exception is, therefore, sustained. All the other exceptions of the defendant are dismissed.

The exception filed by the plaintiffs is dismissed, for the very lucid reasons set forth in the report.

The report is referred to the master to be modified in accordance with the views herein expressed.

[Legal Gazette, Aug. 4, 1871, Vol. 3, p. 245.]

Court of Common Pleas, Philadelphia County.

PERKINS v. WARD.

An appeal will not be allowed to be filed *nunc pro tunc* on the ground that defendant was not summoned, when the record shows that he appeared.

Opinion by PAXSON, J. Delivered July 8th, 1871.

This was a rule to show cause why an appeal *nunc pro tunc* should not be allowed.

The judgment of the alderman was entered on the 5th of November, A. D. 1870. The defendant swears he was never summoned. The original summons, with the return of the constable, has been lost. The alderman's record, however, states that the defendant was summoned. But what is of still more importance, the transcript further states that "defendant's wife appeared, and brought with her a certificate from Dr. Gilbert, stating defendant was very sick," whereupon the case was continued until another day. The record of the alderman shows an appearance by the wife. The defendant says he had no notice. We prefer the record.

Rule discharged.

[Legal Gazette, July 14, 1871, Vol. 3, p. 221.]

Court of Common Pleas, Philadelphia County.

IN EQUITY.

LOUGHERY et al. v. McILVAIN.

1. Where the bill in equity, in which a special injunction is applied for, does not disclose a right to the remedy, it is unnecessary to consider the affidavits.
2. Where the defendant contracted to furnish to the plaintiffs building lumber, in such quantities as he should "deem fit and advisable." Held, that he could stop furnishing such lumber whenever he pleased.

Motion to dissolve special injunction.

Opinion by FINLETTER, J. Delivered July 16th, 1871.

The contract set out in the bill is not verified by the articles of agreement read in evidence. We shall, therefore, consider the case in the light of the written contract. It will, of course,

define the rights and duties of the parties, and our action will be in accord with its express terms, and apparent spirit and meaning. It is as follows:

ARTICLES OF AGREEMENT

Between Alfred H. McIlvain, of the city of Philadelphia, wholesale lumber dealer, of the first part, and James J. Loughery and Edward Gillin, trading as Loughery & Gillin, carpenters, of the said city, of the second part.

Whereas, The said A. H. McIlvain has agreed and promised to sell to the said Loughery & Gillin building timber in the amounts, and to whatsoever extent the said A. H. McIlvain shall deem fit and advisable:

And, whereas, The said Loughery & Gillin are desirous of securing and indemnifying the said A. H. McIlvain in the payment for, against all loss from the said sale of lumber now made or hereafter to be made. Therefore, it is expressly agreed and understood by and between the said parties, that the said Loughery & Gillin, in consideration of said purchase of lumber as aforesaid, now made or about to be made, of and from the said A. H. McIlvain, agree and promise to give the said A. H. McIlvain their promissory note or notes, bearing interest, for the amount of lumber so purchased; said notes to be made drawn payable to the order of the said A. H. McIlvain at not more than four months from the date of the said sale or sales. The said Loughery & Gillin hereby also agree and promise, as collateral security for the payment of the said note or notes when due as aforesaid, immediately upon the execution of this agreement to transfer, or cause to be transferred in advance of said sales and transfer of promissory notes, mortgages to the value of \$9,000; said indentures of mortgages being those given and executed by said Loughery & Gillin, bearing date the 11th day of June, A. D. 1870, recorded in mortgage book J. A. II., No. 48, pages 533, 543, 547 and 550, and secured upon all those lots or pieces of ground situate (two of them) on the east side of Twenty-third street, at the distance of seventeen feet and thirty-three feet south of Pemberton street, respectively; (and the other two) on the south side of Pemberton street, at the distance of sixty and one-half feet and seventy-four and one-half feet westward from the west side of Twenty-second street, respectively. Said mortgages to be the first incumbrances on said premises, to be good and marketable, and of indisputable title.

The said Loughery & Gillin hereby agree and bind themselves to finish the houses now in process of erection upon said premises within ninety days from the date hereof.

It is hereby expressly agreed and understood by and between the said parties, that if upon the maturity of said notes, the same are not paid and cancelled, it shall and may be lawful for the said A. H. McIlvain to immediately sell and dispose of the said mortgages for the best price that he can obtain for the same at public auction or sale, and whatever balance, if any, arise from said auction or sale, to be returned, after payment of the debts, costs, expenses incurred, &c., to the said Loughery & Gillin.

In witness, &c.

It will be seen that the defendant agreed to sell the plaintiffs *building timber*, "in the amounts, and to whatsoever extent he shall deem fit and advisable."

To secure and indemnify the defendant, the plaintiffs agreed to furnish their notes for the lumber sold and to be sold; and also to furnish as collateral security certain mortgages, which it might be lawful for the defendant to immediately sell at public auction or sale, if the notes were not paid at maturity.

To make the mortgages more valuable as securities, the plaintiffs covenanted to finish the houses upon which they were a lien in ninety days.

The notes matured and were not paid. The houses were not finished in ninety days; nor are they now finished. The defendant, on the 30th day of May, 1871, advertised the mortgages to be sold at public sale.

The bill has been filed to restrain the sale of the mortgages. It must necessarily contain all the grounds upon which we are called to exercise the summary power of the court. They are:

1. That after making said agreement, and long prior to any of their notes falling due, plaintiffs requested the said McIlvain to deliver to them the flooring boards and hemlock, which he failed and refused to do.

2. That in consequence of the failure and refusal of the said McIlvain to comply with his said agreement, the plaintiffs were unable to finish and complete any of the houses they were building, and they have been obliged, after very great delay and cost, to procure other lumber for cash, by reason of which delay, greater cost, and cash expenditure, the plaintiffs were unable to meet the notes as they matured.

3. That the said plaintiffs have commenced an action of covenant against the said McIlvain, upon said agreement, which is now pending in the District Court of the city of Philadelphia.

4. That the said McIlvain has notified the said plaintiffs that he intends to offer for sale at auction, by Thomas & Sons, on Tuesday, May 30th, 1871, the mortgages so as aforesaid transferred to him; and as the mortgages are of lots of ground

upon which the houses are being erected, and not yet quite finished, the said mortgages will be greatly injured in their sale, and sacrificed by reason thereof.

As the defendant was bound only by the contract to furnish "building timber, and to whatsoever extent he shall deem fit and advisable," he had a right at any time to refuse to sell or deliver. If he had a right to refuse, he is not responsible for the consequences of that refusal. That the plaintiffs have commenced an action of covenant upon said agreement against the defendant, which is now pending, is no reason why we should restrain him from exercising his rights under that agreement. Undoubtedly we would not permit him to reap the fruits of a contract which he himself had violated. But this must be proved before we would stay his hands. Bringing suit is not sufficient evidence of a broken contract.

It may be that the mortgages may to some extent be sacrificed by a sale whilst the houses are in an unfinished state. But as the defendant is not responsible for the condition of the houses, he is not responsible for the consequences which may flow from that condition.

From the case stated by the plaintiffs, as corrected by the written contract, we cannot see that the defendant has not done all he contracted to do, or that he has done anything he had not a right to do. It is also apparent that the plaintiffs have not performed fully their covenants.

There is, therefore, no equity in the case of the plaintiffs upon their own showing. This makes it unnecessary to consider the facts in the affidavits of the parties.

The special injunction is dissolved.

[Legal Gazette, August 11, 1871, Vol. 3, p. 253.]

Court of Common Pleas, Philadelphia County.

HOWELL et al. v. THE CITY.

Churches, meeting houses or other regular places of stated religious worship are exempt from taxation, though held by the congregation on lease.

Appeal from the board of revision of taxes.

Opinion by FINLETTER, J.

In 1870, a religious congregation being owners of a church edifice on Eighth street, above Noble street, sold it to William Howell. In March, 1871, he leased it to the congregation, Adath Israel, for one year, at the rent of \$800 per annum. The lease further provided that "the lessee also pay all taxes that may be assessed on said premises not exceeding in amount

\$250 per annum, to be paid by the said lessees on or before the 1st day of June.

The property was assessed and returned for the year 1871, at the value of \$20,000. William Howell and the trustees of the congregation applied to the board of revision for a certificate of exemption from taxes for the year 1871, on the ground that the premises were rented on the 22d of March, 1871, and were occupied and used for religious purposes exclusively.

The board decided that the property was not entitled to exemption for the year 1871, "1st. Because it is owned in fee by William Howell, having been purchased by him in 1870. And was so owned by him on the first day of January, 1871. That the tax was due on that day for the year 1871, and cannot be apportioned. 2d. That the said property is not entitled to exemption under the act of April 16th, 1838, because it is not owned by the congregation using it, but is private property, and as such rented to a congregation for religious services; and that private property so rented is not within the spirit and meaning of the said act of exemption."

It is admitted that the property was built for church purposes, and so used until Mr. Howell became the purchaser; that it remained unused and unaltered until he leased it to the congregation, Adath Israel. It is also admitted that in its present condition it can be used only for church purposes; and that the congregation, Adath Israel, is a "religious congregation."

The act of 16th April, 1838, § 29, is as follows: "All churches, meeting houses, or other regular places of stated religious worship * * * all burial grounds belonging to any religious cogregation * * * be and the same are hereby exempted from all and every county, road, city, borough or school tax."

That taxes are an essential element of the rent reserved and thus paid by the tenant cannot be denied. They are so treated by all writers upon political economy, and our everyday observation and experience teach us how thoroughly in this particular theory and practice coincide. However this may be in general, in the case before us, \$250 of the taxes are to be paid by the tenant.

It may be assumed that the object of the act was to aid and encourage religious worship. It embraces the well known and recognized classes—churches and meeting houses, and then, that all may be included, the ancient and modern, the established and those that may be estalished, are embraced in the general clause. The only condition required was that they should be "regular places of *stated* religious worship." That is, that they should be fixed, organized and recognized.

In thus rendering homage to religion, the Legislature but obeyed the almost universal innate promptings of the human heart. Mankind has always in some form made public acknowledgment of their dependence upon God, and have ever held sacred the places wherein they invoked his blessings. To all has come and ever will come the divine command—"put off thy shoes from off thy feet, for the place whereon thou standest is holy ground."

The plain, obvious and natural reading of the act would seem to include *all places* consecrated to regular stated religious worship, without exception of any kind.

But it is said that "private property rented to a congregation for religious purposes is not within the spirit and meaning of the act, although it fulfil all the requirements of the language of the act. In other words, before a congregation can claim any benefit from the act it must own the building.

I cannot thus see the spirit and meaning of the act. It is not in the words, nor can it be extracted from them by any known rules of interpretation. It must, therefore, lie hidden in the philosophy of the act, and its adaptation to the subject matter.

It will be conceded that this charity of the commonwealth was intended to foster religious organizations. With a liberality general as the "casing air" it included all sects and conditions of men. The sole requirement was, that they should bring themselves within its terms in the method of their worship. Can it be possible that this broad and generous policy was alloyed by a distinction, ever base and invidious, between the rich and the poor, and an exclusion of the poor from the bounty of the State? Not thus a great, free commonwealth protects and fosters her children.

It is objected further that the tax was assessed and due on the 1st day of January, 1871, and when the property was not used for religious purposes, and therefore not within the act. It is admitted, however, that it was used for no other purpose. It would not be a violent or unreasonable inference that the purpose for which the owner held the property was indicated by the uses to which he so soon after had it appropriated. But the argument proves too much. It would apply to structures which private munificence might erect in all the glory of church architecture, for the perpetual use of some particular sect or congregation.

The form and structure of a church, internal and external, are characteristic, and not to be mistaken. They designate it as a particular well established class. Such it will remain to the common mind, though no sound of praise or thanksgiving be ever heard within its portals, if unprofaned by things of

earth. In other lands, where God's holy places are dedicated once and forever to his glory, no thought of baser uses ever comes. As generation follows generation, the holiest associations cast a halo of awe and veneration around them, which quickens the faith of the living. And when time has subdued and mellowed the desire of our people for the garish and the new, they too will find a beauty and a fitness in the antique and venerable place wherein their fathers worshipped.

It may not be denied, that, however unseemly it may be, houses of worship are too often turned aside from their proper uses, and made to serve profane purposes. When this happens undoubtedly they lose their characteristics, and are no longer churches. Within and without they put off the livery of Heaven, and soon no vestige of their original object remains to cheat the eye and grieve the heart. But until this does occur, we do no violence to common sense or the common heart by holding that *once a church, so shall it remain*.

The board of revision are directed and commanded to issue a certificate of exemption in the usual form on the property herein mentioned.

[Legal Gazette, August 25, 1871, Vol. 3, p. 263.]

Court of Common Pleas, Philadelphia County.

IN EQUITY.

MILLER v. SELLERS et al.

1. A court of equity has no right to cancel or reform an agreement where there is no allegation of fraud or mistake in its execution, or of doubt or uncertainty in its terms, or of oppression or want of equity in the agreement itself, or in its effects and consequences.
2. Such instruments will not be cancelled for matters *dehors*, or which flow naturally from the rights and powers conferred by the instrument itself.
3. In adjudicating upon the rights and duties of the parties to a contract, the standard of measurement and adjustment to be applied must be found in that contract alone, without regard to the consequences which may result to either under any other contract.
4. The court will not exercise its summary power of injunction where the plaintiff's wrongful acts have contributed to the injury complained of; where the acts of the defendant are not clearly shown to be unwarranted by the express terms or spirit of the agreement; when the injury does not affect the rights of the plaintiff under the contract, or where the relief prayed for would give him no benefit.

Opinion by FINLETTER, J. Delivered July 8th, 1871.

On the 30th day of June, 1868, the plaintiff assigned to the defendants certain patent rights for the period of five years. In consideration thereof they agreed "to commence, at once, the manufacture and sale of such kinds of steam packing mentioned in the several patents as shall be found by them most useful, salable, and profitable, and to use their best endeavors,

to increase the demand for, and extend the use and sale of said packing."

"And further, that they will employ the said Miller as superintendent, to oversee and direct the manufacture of said packing; for which services he shall receive as compensation, wages, or salary, a commission of fifty per cent. of the net profits, realized by the said Sellers, in the manufacture and sale of said packing, which shall be paid to him weekly.

"And the said Miller agrees to use his best skill and efforts in the manufacture of said packing, and to devote his whole time and attention to the same, in such manner as shall secure the greatest advantage and profits to said Sellers, and in obedience to their wishes, direction and control."

In pursuance of this agreement, the defendants commenced the manufacture of steam packing; and expended large sums of money in manufacturing and introducing it to the public; and to a large extent, created and extended the market and demand for said packing.

On the 1st day of March, 1870, the defendants re-assigned one of the patents to the plaintiff, and granted to him also, such use of the other patents, as might be necessary in making the article mentioned and described in said patent. In addition, they released him from his obligation to devote his whole time and attention, as required by the agreement of June 30th, 1868. In consideration thereof, the plaintiff released one-half of his interest in the profits of the manufacture by the defendants, whereby his interest therein became one-fourth.

After the execution of this agreement, and in express violation of its terms, and of the agreement of June 30th, 1868, the plaintiff manufactured packing—the exclusive right to manufacture which, he had assigned to defendants. In further violation of his first agreement, and to the manifest destruction of the business, which the defendants had established under it, he undersold them, reducing the market price of the article from twenty-eight cents per pound to twenty-one cents per pound.

On the 1st day of February, 1871, this court issued an injunction to restrain him from the manufacture and sale of said articles. Subsequently, with the knowledge that the court had granted the injunction, he sold to a person in Chicago 8,000 pounds of the packing.

Under the patent, as he alleges, which defendants assigned to him, he has proceeded to manufacture an article of packing similar in appearance, and adapted to the same purposes, as that which the defendants are manufacturing under their agreement with him. This he has endeavored to introduce into the market at the price of twenty-two cents per pound.

In furtherance of this object, on the 15th day of April, 1871, he issued various circulars from which the following are extracts:

"The globe packing is more easily adjusted than any other packing yet introduced, and in every particular has proved itself after severe tests, the most satisfactory of any ever offered to the public."

"The globe packing is an improvement on the soapstone packing, and overcomes any objection against the latter." When the plaintiff reduced the price of the packing to twenty-one cents per pound, other manufacturers of articles of like character reduced their prices in like manner. Up to the 1st day of June, the defendants manufactured their goods and held them in the market at the original price, viz., twenty-eight cents per pound. On that day they issued a circular which fixed the price at fourteen cents per pound. Whereupon on the 15th day of June, the plaintiff filed his bill, in which he charged that the only consideration of the agreement of June 30th, 1868, *was the profit* to be derived from the manufacture of the packing by the defendants; "that they were bound to make the manufacture as profitable and extensive as they possibly could; that in defiance of their said obligation and of the just rights of your orator and in destruction of the only consideration for which the assignment of June 30th, 1868, was made by him, they have suddenly cut down the price of packing from twenty-eight cents per pound to fourteen cents per pound, and there is no margin for profits left to him."

The relief prayed for is as follows:

1st. "That the said agreement of June 30th, 1868, may be dissolved and cancelled, and that defendants may be compelled to surrender to your orator all the rights secured to them under the said agreement."

2d. "That the said defendants may be restrained by the injunction of this honorable court, from manufacturing or selling packing under the rights secured to them by the agreement of June, 1868; pending this bill, specially, and thereafter during the full term remaining to them of the five years secured to them by said agreement of June 30th, 1868."

A special injunction for five days was allowed, which was continued until hearing. The defendants moved to dissolve the special injunction. In their answer and affidavits they specially deny that they are selling the goods at cost, and allege that, at the present prices, they are making a profit. They further allege "that they have endeavored to establish and extend the business of manufacturing and selling the said packing hoping to render the same profitable to themselves as well as to the plaintiff. That for this purpose they have invested

\$15,000 of capital and have bent every energy and exerted every means in their power. That their efforts in this behalf were beginning to be effective, and reasonable remuneration for their outlay and efforts was beginning to be realized when the trade in said patented article was suddenly disturbed, interfered with, and demoralized, by the wrongful acts of the plaintiff, who surreptitiously manufactured large quantities of the packing and sold the same in considerable quantities, in Philadelphia, New York, Baltimore and other cities at greatly reduced prices from those established by them. That the reduction in price of packing complained of by the plaintiff has been made by them only in self-defence; not merely against the said wrongful acts of the plaintiff himself, but also against the competition of other manufacturers of packing induced by said wrongful acts of plaintiff. That the said reduction has already increased the demand for, and extended the use and sale of said packing. That they have always properly accounted to the plaintiff for his commissions or profits, and have not only paid him all to which he was entitled, but have advanced him considerable sums of money at different times, amounting in the aggregate to over \$2,000, for which their only means of receiving payment, is from the profits to which the plaintiff is entitled under the agreement of June 30th, 1868."

The purpose of the agreement of June 30th, 1868, was the establishment of the business of making packing for the benefit of both parties. The plaintiff surrendered to the common stock his rights in his patents for a period of five years. The defendants not only furnished the capital, viz., \$15,000, but "undertook to commence at once the manufacture and sale of such kinds of steam packing mentioned in the several patents, as *shall be found by them* most useful, salable, and profitable, and to use their best endeavors, to *increase the demand* for and extend the use and sale of packing.

It is manifest from this agreement that the only benefits which the defendants could hope for, were the profits to be derived from the manufacture during the period of five years. On the other hand the plaintiff's benefits were, one-fourth of the profits during this period and *an increased demand* for and extended use and sale of the packing after the period had elapsed.

It is, perhaps, not possible to say, which of these benefits is or would be the greater. It is enough for the purpose of the present case, that they contradict the allegation of the plaintiff's bill, that the *profits* were the sole consideration which induced him to enter into the contract.

In the absence of all stipulations, it was the duty of both parties to do all they could to carry the agreement into success.

ful effect. Nor was it less their duty to abstain from all things which would, in the remotest degree, interfere with its success.

It would not be stating it too strongly to say, that the plaintiff left nothing undone to utterly destroy the business established under his agreement, and to produce the very condition of things of which he has complained in his bill. On the other hand, the defendants not only invested sufficient means in the business—\$15,000, but pushed it vigorously. Until they were undersold by the plaintiff himself, and by others in the trade, who were compelled to follow his lead, they maintained a market price for the goods, which netted a profit greater than the cost of production. The very act complained of by the plaintiff, the reduction of the price, “has increased the demand for, and extended the use and sale of the packing,” and has thus performed more effectually and conclusively for the plaintiff, one of the duties imposed upon them by the agreement.

If it be conceded that no profits now arise from the business, whose is the fault, and whose the injury? Clearly, it is the fault of the plaintiff; and equally clear it is that the injury now and hereafter falls upon the defendants. If no profits be made, they lose not only their labor, but the means they have invested in the business; whilst the plaintiff, if he gain nothing in the present, will be compensated after 1878, by the increased demand for the articles to be manufactured under his patents, of which, from that period, he has the exclusive use. Besides, it must not be forgotten, that the defendants have the exclusive management of this business, and for a period of two years still to come. They are confined to no limit in prices, or in extent of business. Their obligation is simply to make the business over the whole period as profitable as they can, and the demand for the manufactured article as extensive as possible. How they shall do this, we must leave where the plaintiff left it by his agreement—to their own discretion; to their own hope of gain. Even if the profit of the business was the sole consideration which induced the plaintiff to enter into the agreement, and it be conceded that the defendants are now selling without profit, how can we say, under all the circumstances, this course is not judicious! There is no allegation that the defendants threaten to continue to do this until the expiration of the period of five years; and it is not probable they will continue to do so when the necessity has passed away.

We are of opinion, that the bold, prompt, flank movement of the defendants was not only judicious, but, looking only to the interests of the plaintiff, under the agreement of June 30th, 1868, most beneficial. The defendants agreed “to manufacture such kinds of packing as shall be found *by them* most useful, salable, and profitable, and to use their best endeavors to in-

crease the demand for and extend the use and sale of packing." Other objects than a mere increase above the costs of production were contemplated and to be considered; "as shall be found *by them* most useful," "salable," and "to increase the demand for and to extend the use and sale of said packing," are terms quite as important as "most profitable." That these purposes were all to work together harmoniously, and for the grand object of benefit to the parties, over the whole period of five years, may not be denied; and even if it be conceded that some profit at all times was to be made, the plaintiff is met by the allegation in his own bill, that the goods can be made for from thirteen cents to sixteen cents per pound, and by the answer and affidavits of the defendants, that a profit is made at the price at which they are selling the goods.

It was contended by the counsel for the plaintiff, that inasmuch as the plaintiff was entitled to one-fourth of the profits, the defendants had no right to sell their goods below the market price, which he had reduced to twenty-one cents per pound, although they were making a profit.

It would be absurd to attempt to fix arbitrarily any price at which any recognized, manufactured, staple article must be sold. No business man, capable of changing a dollar note, would attempt it; and if he did, he would not only be laughed at, but would soon find that he had no business to control. But to ask a court of equity to constrain a business man to increase his profits, at the expense of the community, would be still more absurd. For a party whose interests were being sacrificed, we might, if we had the right, wind up an unprofitable business, but it would be an extraordinary exigency which should induce us to stop an enterprise because one of the parties in interest refused to charge an exorbitant profit.

We are of opinion, therefore, upon all the facts, that the case of the plaintiff is without merit, and unreasonable. There is no allegation of fraud or mistake in the execution of the agreement of June 30th, 1868, or of doubt or uncertainty in its terms, or of oppression or want of equity in the agreement itself, or in its effects and consequences. Without these, we have no right to cancel or reform an agreement or papers incidental to its fulfilment.

In no event have we a right to cancel such instruments for matters *dehors*, or which flows naturally from the powers and rights conferred by the instrument itself. He who, without fraud, or covin, or mistake, obtains the covenant and agreement of another, may pursue all the advantages to be derived therefrom, without regard to the consequences which arise to him with whom the contract is made. The hard bargains against which courts of equity lean, are those which are apparent from the

face of the contract itself; not the remote consequences and results of the terms of the contract. Nor can that, in a proper sense, be termed a hard bargain, which in its results brings profit and advantage to one, and loss and disadvantage to another, if these results depend upon the individual action of the contracting parties. To so consider, would be to punish energy and reward slothfulness; to restrain sagacious, intelligent foresight, within the narrow circle of plodding, timid dulness.

We are asked by the third prayer of the bill, to restrain the defendants by injunction from manufacturing and selling packing under the rights secured to them by the agreement of June 30th, 1868. This would be not only to destroy the only fruits of that contract, but to confiscate all the labor, time and means, which they have expended for more than three years, in carrying into effect the express conditions which they and the plaintiff entered into; and this without any advantage to the plaintiff himself. For it is very apparent, that no advantage can arise to him under the agreement of June, 1868, by preventing the defendants from operating. If they do not manufacture, no profit can be made. And if they do operate even without profit, he has, at least, the advantage of the extended use and sale of the articles for the manufacture of which he holds the patents. Even, therefore, if it had been shown that the plaintiff had in letter and in spirit, faithfully performed all that was required of him by that agreement, and that the defendants had acted otherwise, still we could not grant his prayer in this particular, inasmuch as we would not thereby give him relief, but would force upon him an injury. To withhold a self-invoked injury in the guise of a right, as well becomes a court of equity as to redress and punish a wrong.

It is, however, obvious from the pleadings, affidavits, and arguments of counsel, that the principal, if not the sole complaint of the plaintiff is that he is injured in his business under the patent, re-assigned to him by the agreement of March 1st, 1870. With this contract we have nothing to do; it is not the subject of dispute between the parties in this proceeding, in any particular.

If, in their consequences, these contracts are hostile to each other, and thereby work injury to the plaintiff, he must endure it without hope or redress. Each must stand or fall upon its own merits. In adjudicating upon the rights and duties of the parties, the standard of measurement and adjustment which we apply, must be found in each individual contract. What the plaintiff and defendants must do or must leave undone under the contract of 1868, must be ascertained and defined from that contract alone, without regard to the consequences which may result to either under the contract of 1870, or any

other contract, and so will it be whenever the contract of 1870 becomes the subject of judicial investigation.

The acts of the defendants complained of by the plaintiff, are done under and by virtue of the contract of 1868, or in violation thereof; it is a law unto them, and is the law of this case. What it prohibits or does not permit, may not be done. Its terms and conditions cannot be considered in their effects upon any other independent contract. It does not controvert this view, or better the position of the plaintiff to say, as he has done in his bill, that the defendants have used the agreement of June 30th, 1868, "to *unjustly injure* him in his business under the agreement of 1870." If the injury flows from the exercise of their rights under the agreement of 1868, they do no wrong; if from something not forbidden by their contract, it cannot be redressed by or through that agreement; if it be the result of a violation of the agreement, then it must appear wherein it is a violation thereof.

Where the plaintiff's wrongful acts have contributed to the injury complained of, or where it is not clear that the acts of the defendants are not warranted by the express terms or spirit of the agreement; or when the injury does not affect the rights of the plaintiff under the contract; or where the relief prayed for would give them no benefit under the contract, a court of equity will not exercise its summary power of injunction. In all these essentials, the plaintiff's case is deficient.

The special injunction is therefore dissolved.

[Legal Gazette, Sept. 1, 1871, Vol. 3, p. 276.]

Court of Quarter Sessions, Philadelphia County.

IN RE GERMANTOWN AND PERKIOMEN TURNPIKE CO.

1. In an inquisition concerning a turnpike company the fact that the jurors have paid toll to the company is not a disqualification.
2. Where the company has received notice of the proceedings, and its superintendent appeared at the hearing, it cannot be objected that the proceedings were *ex parte*.

Opinion by PAXSON, J. Delivered September 5th, 1871.

This was a motion to quash the inquisition taken in the above case. In support of said motion two reasons have been assigned: the first of which is that the jurors were not such disinterested men as are required by the act of Assembly, but, on the contrary, were among the chief toll-payers to this corporation. If the fact of the payment of toll were a disqualification upon the ground of interest, the payment of a single toll would be as effectual in law as the payment of toll daily, and it would perhaps be difficult to find a juror against whom such an

objection might not be urged. The fact that the jurors have paid toll to the company, and might in the future have occasion to do so, is not a disqualification. And herein it differs, perhaps, from the case of a juror who is not a freeholder, where the law requires him to be such. In the case before us, the objection, if any there be, is merely ground of challenge for cause, and the company having failed to make their challenge at the proper time, *i. e.*, before the jurors were sworn and entered upon their duties, it is too late to do so now. A challenge to a juror after a verdict is without precedent.

The second reason is that the proceedings were *ex parte*, and had in the absence of the officers of the company and of their counsel.

It is not alleged that the company had not received notice of the proceedings as directed by the act of Assembly. On the contrary, an inspection of the record makes it clear that the forms of law have been strictly complied with in this respect. After such notice it is no objection to the validity of the proceedings that they are *ex parte*. But the record shows that "the said company also appeared, and was represented by Wm. A. Nestor, superintendent, and by Ezekiel Hunn, Esq., attorney for said company." It was stated at the hearing that Mr. Hunn was not counsel for the company, but merely attended upon his own responsibility, to ask for a continuance on behalf of Mr. Townsend, the counsel of the company, who was absent from the city. But the fact still remains that the superintendent was present at the hearing; and the proceedings were not in any sense *ex parte*.

I express no opinion as to whether the case was unduly pressed in the absence of counsel. The proceeding is a summary one, and there may be cases where delay would be highly objectionable. I have no knowledge whether this was such a case or not.

A plea in abatement has been filed by the company, setting forth that the inquisition was not returned to this court at as early a day as required by law. The delay of some of our aldermen in making returns has been severely censured by this court on more than one occasion; and we have intimated our intention, if the evil is not corrected, of holding some of the offenders to bail for misdemeanor in office; but it was never supposed that such delay operated to the discharge of a defendant.

By the 14th section of the act of 12th of February, 1801, incorporating this company, it is made the duty of the justice, in case the road shall not be put into good and perfect order and repair before the next general court of quarter sessions of the peace, to be held for the county in which the defect is

proved to be, to send a copy of the said inquisition to the justices of the said court, &c., &c. In this case the inquisition was taken on the 31st day of July, and returned upon the 12th of August following. The August term commenced on the 7th of that month. There is nothing in the act which makes it incumbent upon the alderman to make the return on or before the return day. The company are entitled to repair the road between the finding of the inquisition and the first day of the next term; and it is only upon their failure to do so that it is made the duty of the alderman to return the inquisition. He delayed it until the Saturday following the return day. This did not injure the company. On the contrary, it allowed them five days longer within which to repair. The return was strictly in conformity with law, and the objection thereto is not well taken.

The motion to quash, and the plea in abatement, are overruled.

[Legal Gazette, Sept. 8, 1871, Vol. 3, p. 232.]

Court of Common Pleas, Philadelphia County.

IN EQUITY.

KERR & BRO. v. THE CITY et al.

1. By an ordinance of the city of Philadelphia, all leases and sales of property of the city are directed to be made at public auction, to the highest and best bidder, after due advertisement, the city reserving the right to reject any bid not deemed satisfactory.
2. The time to reject a bid is at the auction, and before the hammer is brought down.
3. The ordinance does not reserve any right to the city to reject a bid after such time.

Motion for a special injunction.

Opinion by PEIRCE, J. Delivered September 9th, 1871.

By an ordinance of the city of Philadelphia, of June 5th, 1870, it was directed: That all leases and sales of property of the city shall be made at public auction to the highest and best bidder, after due advertisement in at least five daily newspapers of the city for at least two weeks previous to the day of sale. Provided, that the officer having charge of the sale of any property belonging to the city shall cause to be inserted in the advertisement of the sale that the city reserves the right to reject any bid not deemed satisfactory, and for the best interests of the city.

Under this ordinance the commissioner of city property advertised as follows:

LEASE OF CITY WHARF.

NOTICE.—The wharf at the foot of Race street, on the river Delaware, will be leased for a term of one or three years to the highest and best bidder, at the Philadelphia Exchange, on Tuesday, August 15th, 1871, at 12 o'clock, noon. The city reserves the right to reject any bid not deemed satisfactory and for the best interests of the city

J. H. PUGH,
Commissioner.

In pursuance of said public advertisement, the lease of said wharf was put up at public sale or auction by M. Thomas & Sons, auctioneers, at the time and place designated, and was sold to the complainants, they being the highest and best bidders, at the rent of three thousand eight hundred dollars per annum. The last preceding letting was at two thousand four hundred dollars per annum. The complainants then tendered security for the payment of the rent under said lease, and made demand that said lease be executed to them.

This was refused by the commissioners and the committee of the councils of the city of Philadelphia on port wardens, public landings and wharves, on the ground that since the said public sale of said lease they had received an offer of four thousand dollars per annum for said wharf from Mr. G. W. Bumm, who bound himself and gave security that if the wharf was again put up at public letting, he would bid that sum per annum for it; and that, under the right reserved by the city to reject any bid not deemed satisfactory and to the best interests of the city, they rejected the bid of the complainants, and would again put up the wharf to public letting.

This leads to the inquiry—What is the meaning of the ordinance of June 5th, 1870, and particularly when is the city to exercise her right to reject any bid not deemed satisfactory to the best interests of the city?

In the case of sales by auction, the assent of the parties to the contract of sale is manifested by the knocking down of the auctioneer's hammer. The bidding is a mere offer to buy at the price named by the bidder, and may be retracted at any time before the hammer is down and the offer has been accepted. Addison on Contracts, 154. It follows, of course, that the vendor has the same right to reject the offer that the other party has to withdraw it. But this right must be examined before the offer is accepted, which acceptance, as we have seen in auc-

tion sales, is signified by the bringing down of the auctioneer's hammer. Does the clause in the ordinance referred to reserve to the city any greater right than she would have had without it? Clearly not, unless it must be understood to mean that the right to reject continued after the time of the auction. But this is not the natural meaning of the language. The bid to be rejected was a bid at auction, and the time to reject such a bid is before the hammer is brought down. If the city meant more than this by her ordinance, she should have made it explicit by declaring that she reserved the right not to be concluded by the auction sale, but to reject a bid, even though it should be the highest and best bid, until it should be approved by some designated officer or committee, and a lease or deed executed.

The natural meaning of the ordinance is that the city, by putting up her property at public sale or letting, did not intend to bind herself to take any offer that might be made for it, even though it was the highest and best that could be had at the time, but reserved to herself the right to reject any or all bids, unless she deemed them satisfactory and for the best interests of the city. And the ordinance was notice to persons desiring to become purchasers, and to the agents of the city alike, that by merely offering her property at public sale or letting, she did not bind herself to sell or let it unless the price or purchaser was satisfactory. But the minute the city accepts a bid signified in the ordinary manner of the acceptance of such bids she is bound like any other party, and good faith and the best interests of the city require that she should go forward and execute her contracts without listening to offers from parties who, if they desired the property, had an opportunity to become competitors for it in the manner prescribed by the ordinance.

With the construction of the ordinance contended for by the defendants, it may be readily seen how the interests of the city would suffer by the discouragements of bidders, who would feel little inclined to compete for a property when their bid was at the mercy of a party who, with equal chances in an open competition for it, would lie by, and by after-inducements seek to set aside the sale or letting, and again have it offered to put in competition. What confidence would a bidder have in his second or third offer for it? Time and effort might be expended in the pursuit of it, and at every turn he could be foiled. With the understanding that by a public auction of the city property, this mode of disposing of it was meant, competition would cease, and the interests of the city would suffer. If the party who now offers a high price for the property had made his bid at the public sale, it might have induced greater competition, and the city might have been benefited much beyond his bid of an additional two hundred dollars per annum. It is not cer-

tain that such a result would follow a second sale. Faith in the meaning of such a sale would be lost, and discouragement might be the result. There is another reason why these after-efforts to set aside a fair and open competitive public sale or letting of the public property should not be encouraged.

In these times of unparalleled and frightful municipal depravity, the public business should be conducted in such a manner as to make manifest to all men that it is honestly and honorably conducted, and there is no way in which this branch of the city business can be so fairly conducted as by an open competition, public sale or letting of the city property to the highest and best bidder, according to the requirements of the ordinance, subject only to the reserved right of the city to refuse a bid before it has been accepted by knocking it down to the bidder.

The special injunction is continued.

[Legal Gazette, Sept. 15, 1871, Vol. 3, p. 292.]

Court of Common Pleas, Philadelphia County.

IN EQUITY.

KEELY et al. v. DICKINSON et al.

1. By an ordinance of the city of Philadelphia, it is provided that in contracts for paving streets, the contractor must advertise in accordance with the directions contained in the ordinance, and that the paver be selected by a majority of the property owners.
2. The commissioner of highways cannot waive the rights of the property owners and award the contract to any other person than the one selected by such majority. If he does so, the contract is void.

Motion to continue special injunction.

Opinion by PIERCE, J. Delivered September 16th, 1871.

This is an injunction on behalf of the owners of property on Green lane to restrain the defendant, James Holgate, from proceeding to pave Green lane, in the Twenty-first ward of the city of Philadelphia, under a contract awarded to him by Mahlon H. Dickinson, commissioner of highways, 31st of July, 1871.

Green lane was ordered to be paved with rubble pavement, by a resolution of councils, approved 11th of July, 1871; the paver to be selected by a majority of the property owners.

By an ordinance of councils, approved 31st of December, 1862, it is directed: "That hereafter, before any contract for paving any street shall be entered into by the highway department, the person or persons applying for such contract shall give notice of such application in two daily papers having the largest

circulation, by three consecutive insertions, at least two weeks prior to the making of such application, such notice to set forth:

1. The name of the contractor or contractors.
2. The locality of the space or spaces to be paved, with the length of each space in lineal feet.
3. The name and residence of each person signing for the contractor, together with the number of feet owned or represented by such person so signing fronting on said street or streets.
4. To such notice shall be added an invitation to the owners of property on such street to meet at the department of highways to show cause, if any, why such contract should not be awarded to the applicant. A subsequent ordinance, approved 24th March, 1871, repealed so much of the ordinance of 1862 as required the notice to set forth the lineal feet of each space intended to be paved and the number of feet owned by each person signing for the contractor.

The defendant, Holgate, instead of complying with the requirements of the ordinance to give notice of his application in two daily papers having the largest circulation, by three consecutive insertions, at least two weeks prior to the making of such application, advertised but in one daily paper, on the 22d, 23d, and 24th July, 1871, which was less than two weeks prior to the time of making his application, which was on the 31st of July, 1871. In his notice of application he further failed to comply with the ordinance in omitting to advertise the residence of each person signing for him as contractor.

The mere statement of this case shows that there was an entire failure of duty by both the contractor and the commissioner of highways with respect to the awarding of this contract. But it is intended on behalf of the defendants that on the authority of *Smith v. The City*, 2 Brewster, 443, the city authorities could waive the stipulations of the ordinance and award the contract notwithstanding they had not been complied with. But the cases are not all parallel; and to the extent that the authority to waive in this case is claimed, it would place the city of Philadelphia at the mercy of the heads of departments; and at the will of the officer any ordinance regulating his conduct might be blotted out and his acts left to his own untrammelled discretion. But even if the case of *Smith v. The City* went to this extent, which it does not, the non-compliance with the ordinance in this case was not a waiving of the rights of the city simply. The property owners on the front of the lane to be paved are the parties immediately in interest. They have to pay for the paving, and the resolution of councils confers upon a majority of them the right to select the paver. The commissioner of highways cannot waive their rights. The ordi-

nance of 1862, modified by the ordinance of 1871, prescribes the manner in which the selection of the paver is to be made; and a contract awarded to any other person than the one selected by the majority of the property owners, in the manner prescribed by the ordinance, is void.

The special injunction is continued.

[Legal Gazette, Sept. 22, 1871, Vol. 3, p. 300.]

Supreme Court of Pennsylvania.

AT NISI PRIUS.

SANK et al. v. CITY OF PHILADELPHIA.

1. An ordinance of councils of the city of Philadelphia, was vetoed by the mayor, and returned to councils with his objections. It was repassed over his veto in common council, and sent to select council, where at first it failed to repass, the veto of the mayor being sustained, but was afterwards *reconsidered* and passed over the veto.

Held, that the ordinance in question passed as it was, on a second reconsideration, after the charter test had decided it in the negative, is invalid and against constitutional authority; and that the city authorities must be enjoined from taking any action under it.

2. Under the acts of 1855 and 1856, in regard to the corporation ordinances for appropriations, a general item "for construction of large storage reservoir, East Fairmount Park, \$1,325,000," is not sufficiently itemized.
3. There is no doubt of the right of taxpayers to bring a bill of complaint to enjoin the operation of a city ordinance.

STATEMENT OF THE CASE.

On the 8th of July, 1871, the councils of Philadelphia passed over the mayor's veto, "an ordinance creating a loan for the extension of the water works." Under this ordinance, the city treasurer made an application to the mayor as follows:

OFFICE OF THE CITY TREASURER, PHILADELPHIA, Sept. 9th, 1871.—Hon. Daniel M. Fox, Mayor.—Dear Sir:—Please furnish me with a requisition to sell five hundred thousand six per cent. city loan, from a loan authorized July 8th, 1871.

Very respectfully, yours,

JOS. F. MARCER,
City Treasurer,
Per D. JONES.

A movement on the part of the citizens had been intimated to restrain the issuing of the loan, and this letter, which reached the mayor, was the first announcement of it:

PHILADELPHIA, Sept. 8th, 1871.—Hon. Daniel M. Fox, Mayor.—Dear Sir:—We beg to notify you that we are about to apply, on behalf of tax-payers, for an injunction to restrain the issue of any city bonds under the recent appropriation by ordi-

nance to the water department, on the ground that the ordinance is invalid, and we respectfully request you to suspend any action on your part until the decision of the court.

Yours, respectfully,

E. SPENCER MILLER,
WILLIAM L. HIRST.

In view of the turn of affairs which this letter gave, the mayor responded to treasurer Marcer, as follows:

PHILADELPHIA, Sept. 9th, 1871.—Joseph F. Marcer, City Treasurer.—Dear Sir:—Yours of this morning, asking to be furnished with a requisition to sell five hundred thousand dollars city loan, from a loan authorized July 8th, 1871, is before me. In view of a communication, also, this morning received from Messrs. E. Spencer Miller and William L. Hirst, on behalf of taxpayers, notifying me of an intended application to court for an injunction to restrain the issue of any city bonds under the ordinance in question (a copy of which I herewith enclose), I feel myself obliged to abstain from any action at this time.

Very respectfully,

DANIEL M. FOX,
Mayor of Philadelphia.

Chief Justice Thompson, upon Sept. 13th, 1871, on application, granted a preliminary injunction in the matter, fixing the bail at \$2,000 and the time for the hearing on Monday, the 18th of September. The following is a synopsis of the bill of complaint:

J. Rinaldo Sank and Joseph Megary v. The City, Mayor Fox, City Controller Hancock, City Treasurer Marcer and Chief Engineer Graeff of the Water Department.—It recites the passage of the loan bill by common council, its defeat by select council on its final passage for want of a two-thirds vote, the reconsidering of that vote, and the postponement of the matter for a week, the defeat again of the ordinance when it was subsequently put upon its final passage, and alleges that, under the rules of councils, no question can be reconsidered more than once, and that no motion to reconsider a second time can be entertained, consequently the vote by which, after a reconsideration, the ordinance fell was a final one. It further sets forth that the bill was for a third time put upon its passage and alleged to have passed; that on August 8th, an ordinance based upon the preceding one, and appropriating \$2,222,000, of which \$1,325,000 was for a water reservoir in the park, was passed by both branches of councils and sent to the mayor for his approval; that by a supplement to the act of consolidation, approved April 21st, 1855, the mayor is required to withhold his signature from all new constructions, until all the ordinary and necessary expenses of the city be provided for, and that at the time of the

passage of the last mentioned ordinance, many of these ordinary and necessary expenses, to a large amount, were, and still remain unprovided for in any way whatever; that by the 21st section of the act of Assembly of April, 1855, no appropriation can be made without an ordinance therefor, expressing the objects and the amounts appropriated therefor; that by the 31st section of the act of 13th of May, 1856, all items for which appropriations are made, must be stated under separate and distinct heads; that these provisions were to prevent large and indefinite expenditures of the city's moneys, and that the word item meant the separate head or particular account under which the sum so appropriated would be entered upon the books of the city regularly kept. That this interpretation is supported by the act supplementary to the last mentioned act of May 13th, 1856, section 29th, which requires the city controller to keep separate accounts for each specific or separate item of appropriation made by councils to each and every department of the city, and that all warrants shall state particularly against which items said warrant is drawn; and that no item shall be overdrawn and no appropriation for one item of expenses shall be drawn upon for any other purposes by any department other than the one to which the appropriation was specifically made; that the ordinance making the appropriation is manifestly not in conformity with these provisions; while it assumes, or pretends, to express the objects of each appropriation and the amount to be appropriated to each distinct object, and to state the items of expenditures under separate and distinct heads, it does not properly or sufficiently do so within the meaning of said acts; it was therefore wholly invalid and inoperative; that the mayor vetoed the ordinance making the appropriation on the 22d of August; that common council is alleged to have passed it over his veto, by a vote of thirty-six in the affirmative to fifteen in the negative; that the said thirty-six members of common council were not two-thirds of all the members of that body, as meant by the seventh section of the act of Assembly of February 12th, 1854, and not two-thirds of those members present at any particular meeting; that after the said ordinance was reported to select council as having passed common council, it fell in select council for want of a two-thirds vote; that by the usage of legislative bodies and the construction of the seventh section of the act of February 12th, 1854, this disposition of it was final; that, notwithstanding, a motion was made to reconsider the vote, and it was agreed to, and at a subsequent meeting the question was put whether it should pass, notwithstanding the objection of the mayor, and two-thirds voting in the affirmative the ordinance was declared passed. The bill concludes by alleging that the chief engineer

of the water department, notwithstanding the invalidity of the ordinance, will make contracts for or employ men to perform the work for which said appropriation is alleged to have been made; that the mayor will authorize the sale of the said alleged loan; that the city controller will countersign warrants drawn on said alleged appropriation, and the city treasurer will pay them; that the city in this matter is wholly under the control of the majorities of councils, and utterly neglects and refuses to take any steps whatever; that complainants are tax-payers and citizens, and interested in this matter.

They therefore prayed the court to declare the said ordinances null and void, and to enjoin the chief engineer from making any contracts under the ordinances; the mayor from in any manner aiding in the execution of said ordinances; the city controller from countersigning all warrants under these ordinances, and the city treasurer from paying or allowing them to be paid.

ARGUMENT.

The argument in the matter was commenced on Monday, September 18th, 1871, before Chief Justice Thompson, and concluded the following day.

Messrs. Geo. M. Dallas, E. Spencer Miller and W. L. Hirst appeared for the complainants, and Messrs. W. H. Yerkes and W. P. Messick for the city; R. C. McMurtrie for Mr. Hancock, and H. M. Phillips for the mayor. An affidavit of Mr. Hancock was read, alleging that the estimates and tax levy for each year, sufficient to meet the ordinary expenses of the city, are fixed the preceding year. Also one from Mr. Hodgdon, alleging that Mr. Graeff exhibited estimates to the water committee, and that the ordinances had passed in the usual manner. Also one from Mr. Stewart, corroborating Mr. Hodgdon as to the passage of the ordinance. Also one from Mr. Graeff, alleging that there is a great deficiency in the storage capacity of the works, and that the reservoir is located in the East Park, as on the map of the commissioners.

On the part of the defendants an affidavit was read, which contained a repetition of matters in the bill of complaint. Also, one by Mr. McAleer, of common council, alleging that the ordinance was not itemized properly, and conveyed no information to members of council; that it was passed against his protest, and that it appropriates \$496,000 more than is required. Also, one by Mr. Wm. F. Bull, alleging that the city debt for years past has been constantly increasing, and that the ordinary and necessary expenses of the city have not been and are not provided for. A statement of Col. J. Ross Snowden, taken as an affidavit, was read. It set forth that a *motion* to reconsider a bill that had been vetoed was not in order, the chairman always

putting the question without such a motion, and that no second motion to reconsider could be entertained. He had decided the point while speaker of the State House of Representatives, but as no appeal was taken it did not appear on the journal.

MR. DALLAS then opened the argument for complainants, stating that the objection to the ordinance was that it had been passed over the mayor's veto, at a special meeting after a second motion to reconsider. He recited the facts, and argued that this second motion to reconsider was in violation of the 21st article of the rules for the government of councils, which provides that no second motion to reconsider a bill can be entertained. Though without judicial authority on this point, there yet was the highest legislative power upon it, for the House of Representatives at Washington had decided it. He then read from the Congressional Globe of June 12th, 1844. It was there decided that the Constitution of the United States provided, that when a bill was returned with a veto by the chief magistrate, it should be reconsidered, and without that provision the house could not have touched it, and that having been considered under that provision, *no other motion to reconsider* could be entertained. This decision was also supported by Mr. Cushing in his "Law and Practice of Legislative Assemblages."

If the ordinance had passed at first, it could not afterwards have been defeated on a motion to reconsider, and consequently it could not be brought to life after being killed. The vesting of the veto power in the mayor was to make him, with one-third of councils at his back, as potent as two-thirds without him. But if a second reconsideration was allowed the power of the veto could be rendered utterly useless, as the two-thirds interest could, by getting one of their number to vote with the minority, secure a reconsideration at any time, while the one-third interest could never secure a reconsideration which is granted by a majority. Under the act of Assembly directing the mayor to withhold his signature for all new constructions until the ordinary and necessary expenses of the city had been provided for, there could be no question as to the law, and that the ordinary expenses of the city had not been provided for he deemed equally as clear, for school teachers' and other warrants were daily being stamped and not paid. He maintained that under this act, though the ordinance might be a legal one, no money could be expended under it until the signature of the mayor had been obtained to such a requisition as Mr. Marcer addressed to the mayor on September 9th.

He further contended that, though councils had done all that was required by the act of 1855, as to the object of the appropriation and the amounts, yet the act of 1856 required more explicit itemizing than was contained in the bill.

MR. YERKES, on the part of the defendants, reverted to the fact that there are \$13,000,000 in the sinking fund, which decreases the city debt to \$33,000,000, and that though the ordinary expenses of the city for the last year were between \$6,000,000 and \$7,000,000, the receipts were over \$9,000,000, more than \$2,000,000 above the expenditures. The provision of the act of 1855 relative to the withholding of the mayor's signature, he maintained was repealed by the act of 1864. He further maintained that the act of 1846, which prohibited courts of justice from stopping, by injunction, any public work ordered by legislative authority applied in this case, as the powers being exercised were given the city by direct legislation, and not through inherent right in the municipality. He further contended that the ordinance had been properly itemized, and that even if the act of 1856 had not been complied with, such an error would not make the ordinance invalid, as the act was merely directory.

MR. McMURTRIE followed on the same side, arguing that the only question was, whether there had been sufficient grounds laid to prevent the expenditure of this money. In so grave a case, the court would look at the substance and not the mere form, and this case rested upon the mere allegation that a rule of order had not been conformed to. The same number that voted for the passage of the bill on the mayor's veto could have suspended the rule of order, and that they did not was a mere abstraction, so far as this case goes. The act of 1855 was repealed by the act of 1866, when councils found they were hampered by it, and all bills referred to in the former act are now placed upon the same footing as all other ordinances.

By the act of Assembly of 1856, it was intended that accounts should be kept for the city in the same manner as they are kept in the National and State departments, and it did not mean such minute particularity as is suggested by the other side, and there is no averment that such an account cannot be kept. In conclusion, he maintained that councils had the right to act upon a vetoed bill at any time and in any manner that they chose.

MR. PHILLIPS, appearing for the mayor, said that his client simply desired to do his duty, and that he had performed that duty in signing the ordinance making a loan for the extension of the water works, as the bill had been passed properly, as the number required to pass it could have suspended a rule of order. There was no objection made, and in legislative proceedings that is equivalent to and implies unanimous consent.

There is a mode of suspending the rules of order of a legislative body, but when it comes to an act of the Legislature copied from the Constitution of the United States, it is a very different

thing. The law says that if the mayor does not approve a bill, he shall return it with his objections to the chamber in which it originated, "who shall proceed to reconsider it," and if passed by a two-thirds vote it is valid. The law means that it becomes a binding ordinance if passed by a two-thirds vote, which the *mayor is allowed to make*, or, in other words, that his veto moves the body to make. In vetoing this bill, the mayor did right, and cannot be the subject of an injunction. The power to borrow money vested in the mayor by ordinance, he maintained could be exercised by him at any time, and in any manner that he pleases, and he has the right to demand, if the purpose for which the money was to be borrowed was a proper one, and if not, to refuse to do it.

MR. MILLER followed for complainants, saying that for the purposes of his argument he would admit that the loan bill had been passed properly, but he contended that the bill making appropriations under that loan bill was invalid, because not properly itemized, which he alleged, meant not the one re-division of the ordinance into separate and distinct heads, but so particularly stated as to convey information to members of councils as to the propriety of the appropriations, the correctness of the same, and the work to be done. The law relative to appropriations, &c., was clear. Councils created the heads of the departments, and all work to be done must be by permission of councils. These heads of departments are mere ministerial offices, and are required to furnish councils with estimates, &c., which was not done in this case. It is further provided in the law that no contract shall be made unless there has been money appropriated therefor. If it is not to be done by contract then itemize the appropriation. This ordinance was passed not to meet a contract, but to allow the chief of the department to spend the money without a contract, and he will not deign to give councils his items. An affidavit by Mr. Nead was read, which set forth that no detailed statements of the cost of the new reservoir were ever produced before the water committee or councils; that Mr. Graeff had refused to give him, as a member of the water committee and of councils, his figures, and that he obtained them from the office of the draughtsman of Mr. Graeff; and that from a careful revision of them, he was satisfied that the work could be done for over \$400,000 less than was asked for.

As to the second consideration of a vetoed bill, he maintained that the question was simply whether a member of councils can move to reconsider an act of Assembly, for this matter was regulated by the organic law. When common council passes a bill and it goes to select council, the former council lose all control over it, and when select council passes

it, and it goes to the mayor, and he signs it, they cannot reconsider it. The veto power is intended for that particular to make him a part of councils. The law is peremptory in this matter. It says that councils shall proceed to consider a vetoed bill; they cannot refuse to do it. But that is not all. It goes on: "After such reconsideration"—that reconsideration and no other—"if two-thirds of that council," &c.; that particular sitting, and that one occasion, and not generally the council. Unusual solemnity is affixed to this matter, and you must say that that action can go on indefinitely to meet the views of the other side. Suppose both bills are valid, the money cannot be obtained by the city treasurer, except through the mayor. An amendment to the bills was then filed, setting forth that councils had not authorized any work to be done, and it would be wrong to issue bonds of the city, on which interest would begin, until authority had been given for the work, and that the city treasurer intended to sell bonds to the amount of \$500,000 immediately, &c.

The chief engineer had no authority to build this reservoir, and the act of incorporation expressly prohibits all committees and members of councils from disbursing money, and there is no ordinance authorizing the work, as it cannot be done indirectly by an appropriation bill. If the loan was sold, there would be nothing to pay it to.

MR. MESSICK closed for the city, arguing that no tribunal could award an injunction for the passage of a bill, though against the usual form, because a corporate act, if passed by a majority, though not according to form, is valid. The act relative to the mayor withholding his signature from bills, would not apply to the loan bill, even if it had not been repealed by the act of 1864, which took that power from the mayor. The appropriation ordinance was, he maintained, itemized in the full spirit of the acts of Assembly, which intended thereby that by such itemizing the city's accounts could be kept correctly. No money can be drawn from the treasury for private or political purposes, because no appropriation can be drawn upon save for the purpose for which it had been made.

He alleged that the reservoir had been located in the East Park on a map that was printed, and that the park commissioners had acquiesced. He also contended that the particularity of the itemizing of any bill was within the discretion of councils, and the rigid construction of acts of Assembly will not be applied to ordinances. As to the point of a second reconsideration of a bill, he maintained that when a bill was vetoed it came back to the chamber in a new shape, and the consideration of a bill so vetoed was a first consideration, and not a reconsideration; and there is nothing in the law that says

if it is not passed that it shall not at a subsequent time be reconsidered.

MR. HIRST, on the part of complainants, closed the argument, saying, that there did not appear to be much of a defence to this case, and the greatest defence was the controller, who had nothing at all to do but simply to countersign the warrants, and he could see no reason why that gentlemen should employ private counsel.

The fact that in the midst of a summer recess, at a special meeting, between dinner time and tea, this appropriation was rushed through, would raise the question whether this was a deliberative body. A chancellor will watch such hasty legislation, and when their acts are scanned what is found? Why in two years they have given Mr. Graeff \$3,000,000, and now they want to give him \$2,000,000. In the 1,000,000 appropriation for 1870, there is an item of \$75,000 for an engine at the new water works, and the first item in this appropriation is exactly the same item; thus paying it twice. This is the result of hasty legislation.

This ordinance contains an appropriation of \$220,000, for the rebuilding of Fairmount dam, and not a word of explanation is given as to what is the matter with the dam. This ordinance deserves no mercy. Here is a case, leaving out the undefined purposes, where is appropriated \$1,325,000, which is a waste of \$500,000, undenied at this bar; no proposals suggested, no estimates or details, nor the area, the width nor the depth, submitted to the councils, and not even submitted to the court at this late day. It is in violation of all the acts of Assembly on the matter.

It is the bounden duty of the chief engineer, by ordinance, to do what he has not done, and refused, and still refuses, to do. In 1855, the Legislature said that councils need only put in their ordinances the purpose and the amount. But that only lasted a year, and then they said that councils must give the items. It did not mean the mere footing up or lumping. All heads of departments are required to give estimates and detailed items for the information of members of councils. But this ordinance does not do it. If this is to stand, the future is to be dreaded.

It is part of the defence, that this practice has become custom-hardened, especially concerning the water department; there is no difficulty in itemizing the appropriations to other departments. The law requires that the ordinance shall specify whether the work is to be done by contract or otherwise, which here is not done. He also contended that one reconsideration of a vetoed bill was final, otherwise the veto power would be worthless. Two of these members of councils say by these votes that the mayor was right; they go out, and

returning, say he is wrong. It is saying my conscience is with you, but my caucus is against you, and I am with my caucus. For this ordinance was passed by gentlemen who marched up into the council in procession from a caucus. He read from the controller's report of January 1st, 1871, showing that \$2,769,000 of the expenses of the city for the preceding year had been paid, while there were \$3,380,000 of outstanding accounts unpaid. In closing, he referred to the injury to the city's credit that a refusal of this injunction and the placing of the loan upon the market would cause.

An affidavit of Mr. Graeff was read, setting forth that the appropriation of 1870 referred to by Mr. Hirst was a mistake, and further alleging that he did not believe the amount asked for the new reservoir to be excessive, and that he would use the money therefor for no other purpose.

Chief Justice Thompson stated that he would endeavor to decide the matter before the end of the month. In the meantime the injunction would be continued.

Opinion by THOMPSON, C. J. Delivered September 29th, 1871.

The argument of this case took a much wider range than I deem it necessary or expedient to follow. I shall only, therefore, notice at any length those points which seem most essential to the final disposition of the case.

The complainants' bill refers to and complains that the two ordinances therein referred to, viz., "An ordinance creating a law for the extension of the water works," approved July 8th, 1871, and "An ordinance to make an appropriation to the department for supplying the city with water, for the purpose of extending the water works," passed by councils on December 5th, 1871, are invalid, and prays an injunction to restrain action of the city authorities under them or either of them.

The first of these ordinances was passed by councils and approved by the mayor, but it is alleged to be invalid notwithstanding, because, in select council it did not receive a two-thirds vote as required by the act of February 2d, 1814, section 39. That is true, but this vote was reconsidered and the bill again failed for the want of the requisite two-thirds vote, and a second time it was reconsidered and finally passed, having received a vote of two-thirds of the councils. This second consideration was directly in contravention of the twenty first rule of the select council, and also of the *lex parliamentaria*. But I need not delay to prove this, for at most the proceeding was but an irregularity, and did not invalidate the ordinance. The two-thirds requisite to pass the bill, and which voted for it, were competent to suspend the rule, and we ought to regard the vote on the passage of the ordinance as a virtual suspension of it, although it does not so appear on the journal. This por-

tion of the complainants' bill furnishes, therefore, no sufficient reason for enjoining the defendants.

The question I shall next notice, although not in the order in which it is presented in the plaintiff's bill, is somewhat of the nature of the question just noticed, but depends on different principles for its solution. It has relation to the proceedings of councils on the mayor's veto of the second of the above-mentioned ordinances, namely, the appropriation ordinance.

It appears by the journals of councils that on the 22d of last August, the mayor returned to the common council the last above-mentioned ordinance without his signature, and with his objections thereto. That body proceeded to a reconsideration thereof, and passed it over the mayor's veto by the requisite two-thirds. On the same day it was transmitted to the select council, where, on a reconsideration, the ordinance failed for want of a two-third vote, and the mayor's veto was sustained. A motion was then made, seconded and entertained by the chair, to reconsider the "vote by which said bill was not passed, notwithstanding the objections of the mayor." This motion was agreed to by the majority, and the question "postponed for the present." On the 5th of September, ult., that question was taken up, and two-thirds of the chamber voting for it, the ordinance was declared "carried," notwithstanding the veto of the mayor.

As a parliamentary question, the ordinance was, therefore, declared a binding ordinance. Is this to be the judicial result on the same question?

Our jurisdiction of this question was not controverted on argument, nor could it have been, with any prospect of success. Although we have not the control of municipal, as we have of private corporations, by the act of 13th June, 1836, conferring equity jurisdiction on this court, we are invested with power to restrain "acts contrary to law, and prejudicial to the interest of the community or the rights of individuals." I need not cite cases in which this court has exercised jurisdiction on complaint of tax-payers, the city being a party. This, however, is not disputed. If, as the bill charges, this ordinance is not valid and binding, all acts done under it would necessarily be without authority and contrary to law, and ought to be restrained.

The provision on the subject of the exercise of the veto power by the mayor is to be found in the seventh section of an act approved the 2d day of February, 1854, entitled "A further supplement to an act to incorporate the city of Philadelphia." So far as the act remains unaltered by subsequent legislation, it is the fundamental law of the corporation, the constitution or charter of the city, and as such binds every city functionary.

The provision reads thus:—"Every ordinance which shall have passed both councils shall be presented to the mayor; if he approves he shall sign it, but if he shall not approve he shall return it with his objections to the council in which it originated, which shall proceed to reconsider it. If, after *such consideration*, two-thirds of that council shall agree to pass the ordinance, it shall be sent with his objections to the other council, by which likewise it shall be reconsidered, and if approved by two-thirds of that council also, it shall be a binding ordinance; in such cases the votes of both councils shall be determined by yeas and nays, and the names of the members voting shall be entered on the journals."

This provision, with only such changes as were proper to adopt it to the city government, was evidently copied either from the United States or the State constitution. It is in fact common in substance, if not in words, to every State constitution in the Union. I need not stop to discuss the great principles involved in it, further than to say its design was to protect minorities and to prevent or correct hasty or improvident legislation. It is a most salutary provision, never in a free government to be disregarded or forgotten.

The question for determination here is, whether, after a vote taken in either branch of councils in accordance with the provisions of the fundamental law, the charter of the city, it can again and again be reconsidered until the requisite number is had to overrule the veto; for if it may be reconsidered once after the constitutional reconsideration is had, there is no limit to the number of times it may be reconsidered. It strikes me that no candid reader, with a full sense of the binding obligation of the provision in his mind, could hesitate to conclude at once that after a veto of the President of the United States, or of the governor of the State, and a vote reconsidering the bill had passed sustaining the vote that that was not a finality as to that measure. The same result must, of course, follow upon a similar provision in the city charter. That is its constitution as fully and efficiently as are these constitutions in their relation to the governing powers. The provision is not merely directory; it is undeniably mandatory. It provides for everything to be done on the contingency of a veto, the number requisite to overturn it, the mode and manner of taking the veto, the duty of the body to enter the names of the members voting on the journal, and finally, the result of such a vote, in case it overrules the veto, viz.: That the ordinance shall be a "binding ordinance." If, after "such reconsideration," says the provision, a vote overruling the veto having passed, it shall be a "binding ordinance." In no other way is this result to be attained in accordance with the charter, unless

the provision itself be disregarded. Can there be a substitute for the provision? To grant this is to imply that it is not binding at all. Judicial decision to that effect would be an interpretation of that portion of every constitution in the Union; and if respected would be a virtual abolition of them all in this important particular.

The idea was suggested on argument that there is no affirmative declaration, that, in the event of a failure to overrule the mayor's veto by the constitutional number, that the ordinance would be a nullity. This was not necessary. The mode of testing the question being prescribed, together with the result, in case of the overthrow of the veto, is the exclusion of all other modes and results.

The maxim *expressio unius est exclusio alterius* expresses the idea in such a contingency. Indeed it has been said, and I think truly, that anything prescribed by a constitution is a prohibition of all other modes that might be devised for doing it. 9 P. F. Smith, 100. To the same effect is *Page v. Allen*, 6 W. 538. All, after the constitutional method is exhausted, is *ultra vires* the lawful power of the body, and of non effect.

The test that a reconsideration cannot be had of a bill or ordinance passed over a veto, has weight. Why is it so? Undoubtedly because the constitution, and in this case the charter, declares the effect and result of such action to be a binding act or ordinance, and so consequently it must remain unless repealed. It is, therefore, with great force said, that if a constitution or charter rules the result in one event, it leaves the other a finality also. But without further reasoning the point, perhaps the most satisfactory test of the question is, that the parliamentary authorities are against a second reconsideration of a vetoed bill. I cite without quoting from them: *Cushing's Law of Leg. Assemblies*, section 2388; *Cong. Globe*, vol. 13, p. 762; *Wilson's Dig. Par. Law*, p. 292, section 2151, and references; *Barclay Man.* 164, and references. We have testimony also in the case by an experienced parliamentarian, and my own experience in legislative bodies of some ten years, is without exception to the same effect. I find but one recorded precedent the other way, and that occurred in the House of Representatives, in this State. *Smull's Leg. Man.* 122. It is to be little regarded against the current of authorities cited and the overwhelming reasons existing in their favor, which might be more fully given if necessary.

It follows as a result of these observations that I must regard the ordinance in question, passed as it was, on the second reconsideration, after the charter test had decided it in the negative, as invalid, and against constitutional authority; and that the city authorities must be enjoined from taking any action

under it. If second, third, or more reconsiderations of a vetoed ordinance be allowed, it is plain that in the end the veto will be overruled, especially so if it provides for large expenditures of money. Parties hoping to have the handling of it, by the aid of "rings," a term descriptive of combinations which are known to infest legislative bodies everywhere in this country, will be very sure in the end to overthrow the veto, be it ever so well grounded in sound principles, or convincing in argument. This will be the inevitable result of repeated reconsiderations of the question, and thus a great constitutional conservation of the rights of minorities, and safeguard against inconsiderate legislation, be set at naught.

There is no safety but in adhering strictly to the constitutional rule. If a second reconsideration can be had, as already said, there is no limit to the number that may not take place.

It is fortunate that we are unembarrassed by considerations of rights acquired under this ordinance, or injurious consequences occasioned by delay. There need be but little further delay in properly providing for the completion of reservoirs under way, or for additional supplies of water if needed. I can hardly realize the peril of a short delay, more especially as councils have let the spring and summer pass without a movement to avoid it, and only awake up to it as winter approaches. The argument of delay, however, if more persuasive than it is, would not be sufficient to set aside a constitutional provision, and the consequent duty to observe and regard it.

The next point which I shall notice is the one made by the mayor in his veto message, namely, is the ordinance properly and sufficiently itemized? If it is not, is this a ground for injunction? If no items appear in an ordinance, when it is apparent various items of work are to be done, I think it clear that action under such an ordinance ought to be stayed by injunction. The act of 1855 provides that the "object" of any appropriation ordinance should be stated in it. Of course this was intended as a source of information to the people of the city, who are ultimately to pay for expenditures. In this respect it was a wise measure, but too indefinite for practical use, too easily to be evaded. The next year, 1856, more was required; the items of every appropriation are required to be given. I do not think this was meant altogether for the accounting officers, as suggested, but was intended also as a means of more specific information to the people. Let it be that both these objects were in view in the act. How stands this ordinance? I regard the itemization of it as sufficient, excepting the seventh, that is in these words: "Item 7. For construction of large storage reservoir, East Fairmount Park,

one million three hundred and twenty-five thousand (1,325,000) dollars." If the direction of the statute is to be observed at all, and if its object, and that of the act of 1855, be to give information to the public of the extent of liability it is about to incur, this item is illusory and might be a snare. Neither size, depth, nor materials of construction are hinted at, nor location fixed or stated to have been fixed. "Large" is a comparative term. It would be large, comparatively *large* if it were to cover twenty-five acres. Is that to be the size? Or is it to be larger? If so, what arithmetical numbers fixes its extent, either superficially or cubically? There are none given. It is said it is to cover one hundred acres; if so, that should have been stated in the item, or at least by reference to the engineer's plan, and so ought the height, depth, materials, etc. From the item itself nobody can derive any more information than if it had been stated to be \$1,325,000 for water. I fully admit the *prima facie* conclusiveness of councils in framing their ordinances and designating the items. But some authority must exist to determine whether a proper discretion has been exercised by them in that respect, as well as in all cases where there is a discretion to be exercised. It is only when it is unlawfully and improperly exercised that courts will interfere. The councils are not sovereign in any sense; they cannot alter a letter of the law creating or governing them, and courts must of necessity judge whether they keep within the law, and interfere when they are outside of it. They are but officers and agents of the corporation, and are amenable to control if they disregard the law's limitations. I regard, therefore, item No. 7 as in no respect what it should have been in order to comply with the acts of Assembly referred to.

Another objection to this ordinance, and charged in the bill as invalidating it, is that it is in derogation of the twenty-first section of the act of the 21st of April, 1855. That is a supplement to the "act consolidating the city," and provides that the mayor shall withhold his signature "for all new constructions and redemption of tolls, until all the interest accruing on the loans of the city, and the principal of those becoming (falling) due, and the ordinary and necessary expenses of the city, and the administration of justice in the county, shall be adequately provided for." I regard this provision of the statute still in force, and not repealed, as contended for, by the act of the 31st of March, 1864. The testimony on this point, however, is in *equilibrio*, as to whether the ordinance violates the provision or not. It is not necessary to pronounce upon this, as my opinion is adverse to the ordinance on other grounds. No doubt the veto of the mayor will be sufficient to correct an error in this respect if it occurs in the future.

Something was said questioning the right of complainants, as tax-payers to file this bill. I have no doubt of their right. We have held this more than once. It seems to me it is most appropriately their province. Some, as well as all, can do it. It would be impossible to make all the tax-payers parties to the bill, and hence some must act, or none will. The tax-payers bear all the burdens of expenditures by the city. They ought, in order to protect themselves from unreasonable burdens, scrutinize the acts of their servants when proposing to increase their burdens. All feel the heavy weight of taxes at present, and perhaps necessarily levied, and may very certainly anticipate advances in this direction before long. It is true the rate per cent. of \$1.80 on the hundred of real valuation, seems small, but it ought to be recollected that the assessed value of real property in the city is high unto, if not entirely up to, its actual cash value. When that comes to be the case, if we have not already arrived at it, and more money is wanted than that produced by the present rate per cent. and valuation, it must be obtained by increasing the rate per cent., and then any delusion existing on the subject of the unreasonableness of present rates will at once vanish. With this as a reason for my conclusion, I predicate nothing, but to tax-payers it possesses much interest, and illustrates the propriety of their being parties to bills like this.

I am of opinion that the injunction in this case may be continued against all parties embraced in it excepting the mayor. He has shown himself opposed to the action under the appropriation ordinance. This his veto proves; and it is not alleged that he threatens to attempt to borrow money under the loan ordinance. He has the sole authority to do so under it, but may, if he please, delegate it to the city treasurer or any other agent he may choose. The latter cannot act without the authority of the mayor. It is not alleged that he proposes to exercise his power and authority at present, there being no appropriation bill to authorize it.

September 29th, 1871. The injunction is dissolved as to the mayor, and continued as to the other defendants until further orders.

Circuit Court of the United States, Eastern District
of Pennsylvania.

SALT MANUFACTURING COMPANY v. THOMAS & BARRY.

1. In the reissue of a patent, the patentee has a right to restrict or enlarge his claim so as to give it validity and effectuate his invention.
2. A patentable subject must be not only new and useful, but it must involve some exercise of the inventive faculty, and it must not be merely the application of an old thing to a new use.
3. But though the subject may have been in existence before the patent, yet if it was unavailable for general use, and the inventor by his method invested it with commercial properties and practical adaptabilities which did not pertain to it before, it has just claims, in a commercial sense, to be regarded as a new product.
4. The patentability of an alleged invention is, in many cases, most satisfactorily shown by its utility.

Opinion by McKENNAN, Cir. J. Delivered October 2d, 1871.

Pennsylvania Salt Manufacturing Company v. E. A. Thomas, Pennsylvania Salt Manufacturing Company v. Christian Barry. The complainant is the assignee of George Thompson, to whom reissued letters patent Nos. 2570 and 2571 were granted, for the unexpired term of fourteen years, from October 21st, 1856. The first is for the process of putting up caustic alkali (soda or potassa) in metallic casing or integument, by pouring the molten caustic alkali into the casing, and then doing up the top; and the other is for caustic alkali enclosed in a light metallic integument or metallic casing. One is for the process of putting up caustic alkali, the other for the product of such process.

The validity of these reissues is assailed upon the ground that they are not for the same invention described in the original patent. They are divisions of the original patent, and are therefore to be treated as but one patent, with two distinct claims. Although this division of the patent may have been unnecessary to effectuate the invention, it in no view impairs the validity of the reissues. Nor will discrepancy in the titles, and variations in the description and claims of the original and reissued patent, avoid the latter. Their effect results only from diversity of subject matter. *Battin v. Taggart*, 17 Howard, 84.

The material inquiry then is, is the subject matter of both patents the same invention? In other words, are the process and product claimed in the reissues substantially described in the original?

In the original patent the nature of the invention is stated to consist in a "new and useful mode of wrapping cakes of potash or caustic soda in air tight wrappings, so as to preserve it from the action of the atmosphere, being designed to enable the

manufacturer of caustic alkali to put them up in original packages of uniform size and weight, of such convenient size that when a package is opened the whole may be used at once." Two modes of carrying the invention into effect are described. One is to provide canisters of thin sheet iron, cemented at the joints with inflexible cement, into which the caustic alkali is poured in a molten state, and while hot the lid is closely fastened down, so as to exclude the atmosphere. Now, while this patent describes and claims the process of putting up caustic alkali in air tight integuments, it describes also the object and result of the process. Packages of caustic alkali are produced of uniform weight, and such convenient size that when a package is opened, the whole may be used at once. The very object of the description is to indicate a product possessing original merits, as the result of an improved process.

In re-issue No. 2570, which is for "an improved process of putting up caustic alkali," the description of the process is, manifestly, in substantial accordance with the description in the original specification.

Re-issue No. 2571, is for "an improvement in the manufacture of caustic alkali," and Cairn's "caustic alkali, encased or enveloped in a tight metallic integument or casing, substantially as above described." The mode of encasing it, and its peculiar properties when encased, are distinctly described and stated, and with no material variation in phraseology from that employed in the original specification.

It is apparent that the subject of both specifications is caustic alkali, so put up and prepared as to secure special commercial properties, protection against deliquescence, capability of safe transportation and adaptation to general use. The re-issued patent then is for the same alleged invention described in the original specification, and the apparent object of the amendment was to make an explicit claim for it as a new article of manufacture and commerce, which was distinctly indicated as the patentee's invention, but was not technically claimed in the original specification.

It has been repeatedly adjudged that this may be done. "This," says Mr. Justice McLean, in *Battin v. Taggart*, 17 How. 84, "the patentee had a right to do. He had a right to restrict or enlarge his claim, so as to give it validity and effectuate his invention." And so Mr. Justice Grier held in passing upon this patent, in this court, in *Pennsylvania Salt Manufacturing Co. v. Guggenheim*, 3 Fisher, 423.

The respondent further objects to the patent, that the invention claimed is not novel. I do not propose to notice in detail the evidence adduced on this point. It is sufficient to say of it generally, that it does not prove that the product, with distin-

guishing properties claimed by the patentee to belong to his, was in use before his invention. The hydrate of soda was a well known chemical substance, rapidly deliquescent when exposed to the air, since, by reason of its causticity, difficult to handle, and dangerous to transport, an obvious security against these risks was to enclose it in anti-corrosive, air tight vessels, and so it was treated; but in the modes adopted for its preservation it was only employed in the laboratory, in surgical operations, and in the arts which would admit of the use of large quantities of it at one time.

It was not until George Thompson, after repeated experiments, perfected his method of putting it up, that caustic soda was brought into very general household use in the manufacture of soap. This was undoubtedly due to the plan devised by him for its preparation, whereby portability, safety and convenience in handling and transportation, and special adaptation to domestic use, were, for the first time, secured. The proofs, therefore, fall short of overcoming the presumption of novelty arising from the patent.

A grave objection is that which brings in question the portability of the alleged invention. A patentable subject must be not only new and useful, but it must involve some exercise of the inventive faculty, and it must not be merely the application of an old thing to a new use. It is undoubtedly true that small metal cans and infusible cement were in use before Thompson's invention, and that caustic alkalis were preserved from deliquescence by inclosure in air tight packages of glass, iron and wood, but still the fact remained that caustic soda was unavailable for general use, and especially for the domestic manufacture of soap. By Thompson's method it was invested with commercial properties and practical adaptabilities which did not pertain to it before.

Its deliquescent tendency and corrosiveness confined its consumption within narrow limits. By Thompson's efforts these difficulties were practically overcome, and it was fitted for general use and the supply of a universal want. In the language of Mr. Justice Livingston, in *Langden v. De Groot*, 1 Paine, 206, it was rendered "more portable and convenient for use." The effect was immensely to increase its consumption in the domestic production of soap, which was before manufactured by other methods, or in large establishments only. Indeed, it may be considered as originating a new branch of domestic manufacture. This is certainly indicative of original merit, and is demonstrative of its great public utility.

The patentability of an alleged invention is, in many cases most satisfactorily shown by its utility. In Webster on "Subject Matter," 30, it is said, "The utility, then, of the change,

as ascertained by its consequences, is the real practical test of the sufficiency of an invention; and since the one cannot exist without the other, the existence of the one may be presumed in proof of the existence of the other. Wherever the utility is proved to exist in any great degree, a sufficiency of invention to support the patent must be presumed." Judged by the standard of utility, then, a sufficiency of invention to support this patent is to be presumed.

In a commercial sense, it has just claims to be regarded as a new product. It was so treated by Commissioner Mason in the original application for a patent. In his opinion, he very forcibly says: "Had he discovered an ingredient which, mixed with alkali, would, without injury to its properties in other respects, have prevented it from a tendency to deliquescence, he would have made a patentable discovery. Is this not equally so? In fact, the packages of alkali, done up as proposed, may in substance be deemed a new commodity, a new article of merchandise, for although its constituent ingredients are the same as were before known and used, a new property has in reality been communicated to it. In point of fact the article now offered for sale is the alkali without any tendency to deliquescence; this though chemically not new is so commercially, and is so proved by the affidavits filed." Equally satisfactory proof of this has been exhibited in this case, and to this is to be added the wide extension of its use, as a significant recognition of its novelty as a commercial product.

The whole question was before this court in the *Pennsylvania Salt Manufacturing Company v. Guggenheim*, and the patent was held to be valid. Such a judgment, pronounced by a judge whose knowledge, experience, and ability, invests his opinion with the weight of high authority, must and ought to overbear all doubts upon the subject in this controversy.

That there are differences in the method employed by the complainant and respondent to encase the soda and seal the packages, is doubtless true; but the product of both is substantially the same, viz.: caustic soda enclosed or enveloped in a tight metallic integument, which may be preserved and transported, and thus introduced into general use.

The respondent is, therefore, an infringer.

Inasmuch as the patent of the complainant expired on the 21st of October, 1870, a decree for an account only can be entered, which is accordingly directed. Let a similar decree be entered in the case of *Pennsylvania Salt Company v. Barry*.

Circuit Court of the United States, Eastern District
of Pennsylvania.

IN ADMIRALTY.

MERCIER v. LACHENMEYER.

James T. Abbott & Co. were the agents employed by Otto Lachenmeyer to charter a vessel on behalf of John Lachenmeyer, with specific instructions as to the kind of vessel to be obtained, the ports of sailing and discharge, etc. They holding themselves out as agents of Lachenmeyer, chartered the vessel of John Mercier, the libellant, but altered the terms of the charter-party authorized by the respondents, who disavowed such new charter-party and notified the libellant of such disavowal.

Held:

1. That James T. Abbott & Co. were special agents, and only their acts within the scope of their instructions are binding upon their principal.
2. There being shown no act or declaration of the principal from which an enlargement of this limited power of the agents can be presumed, the respondents cannot be charged with the obligation of a contract, to which they did not, by express authorization or legal implication, yield their assent.

Appeal by the libellant from the decree of the District Court for the Eastern District of Pennsylvania.

Opinion by McKENNAN, Cir. J. Delivered October 2d, 1871.

James T. Abbott & Co. were ship agents at St. Thomas, and were the correspondents of Edmund A. Souder & Co., of Philadelphia. Otto Lachenmeyer, one of the respondents, was in the employment of E. A. Souder & Co., and in conducting their correspondence with James T. Abbott & Co., authorized them to charter a vessel for his father, John Lachenmeyer, to carry lumber from St. Mary's, Georgia, to Montevideo, sending them a printed form of charter-party used in the business of E. A. Souder & Co., limiting the freight rates to be paid to \$19 to \$20 gold "flat," per M. feet, and if absolutely necessary, to add a gratuity of \$50 to the master, and with the privilege of ordering the vessel to a port on the Uruguay, not above Paysander, or to Rosario on the Parana, at, \$2 per M. feet additional freight. This order was renewed several times by Otto Lachenmeyer, modified only by an enlargement of the limit to \$21 gold, and an optional change of the place of loading to Fernandina or Lachlissin's Mills.

On the 23d December, 1869, James T. Abbott & Co. chartered, at St. Thomas, the libellant's vessel, the *St. George*, and, in the name of Otto Lachenmeyer, entered into a charter-party with him, by which he was to receive \$21 gold per M. freight, a percentage of 5 per cent. per M. and, if the destination of the vessel was changed to Rosario, Fray Rentos or Paysander, an additional freight price of \$2.50 per M. feet.

In pursuance of this charter, the libellant immediately sailed to St. Mary's, where he was notified that the respondents disa-

vowed the charter-party, as having been made in violation of instructions to James T. Abbott & Co., and that lading would not be furnished on the footing of it.

The libellant awaited at St. Mary's the expiration of his lay days, and until the 9th of March following, refusing any other engagement of his vessel, and has filed his libel to recover the demurrage stipulated by the charter-party, and the damages arising from its non-fulfilment by the respondents.

The libellant can recover only on the footing of the contract made with him by James T. Abbott & Co. If it substantially embodies the terms for which they were authorized by the respondents to stipulate, it is the respondents' contract, and the libellant had a right to call upon them to fulfil it.

That an agent can bind his principal only within the extent of his authority, and that this must be ascertained, at their own peril, by those who deal with him, is an elementary principle of the law of agency. In its application, it is relaxed only where the principal, by his acts or declarations, or by a general substitution of the agent for himself in the transaction of the kind of business entrusted to him, authorizes the presumption that the agent is invested with unrestricted discretion as to the subject matter of the agency, or at least with power to bind his principal to the extent to which he assumes to act for him.

What then is the relation in which the parties stand to each other? It is plainly such as ordinarily results from the exercise of authority by one who is employed to perform a service for another, under special instructions and with limited powers. Jas. T. Abbott & Co. were the agents employed to charter a vessel in behalf of John Lachenmeyer, with specific instructions as to the kind of vessel to be obtained, the ports of sailing and discharge, the price to be paid for freight and the amount of gratuity to the master. There were, therefore, special agents, and only their acts within the scope of their instructions are binding upon their principal. No act or declaration of the principal has been shown, from which an enlargement of this limited power of the agents can be presumed, and it is hardly necessary to add that no such effect is due to the fact, if it be a fact, that James T. Abbot & Co. were the exclusive shipping brokers of Edmund A. Souder & Co., at St. Thomas. The latter were the intermedium through whose connection with James T. Abbott & Co. the negotiation was conducted and their employment was effected, but certainly neither the nature nor extent of their relations can operate to charge the respondents with the obligation of a contract, to which they did not, by express authorization or legal implication, yield their assent. In point of fact, such an assumption is repelled by the charter-party itself, for upon its face James T. Abbott & Co. describe

themselves as the agents of Otto Lachenmeyer, not of E. A. Souder & Co. There was no room for misconception by James T. Abbott & Co. They knew who their principal was. They represented themselves to the libellant as acting for Otto Lachenmeyer, and thus the libellant was warned of the duty, and informed of the means of ascertaining the nature and limitations of the contract which they were authorized to make with him. Nor was there any ambiguity in the instructions given to the agents. What may be the meaning of the term "flat," which has supplied a subject of such earnest discussion and animadversion by counsel—this much is clear: That \$21 gold per M. feet and \$50 currency to the master were authorized to be paid, and an additional \$2 per M., if the port of discharge was changed by the charterer to the Uruguay or Parana. Now, instead of these rates, to which James T. Abbott & Co. were limited by their instructions, they stipulated for \$21 gold, and five per cent. primage also in gold—which is a form of gratuity to the master—and \$2.50, if the destination of the vessel was changed. Is such a contract, in the execution of which the agents did not observe their instructions, and provided for payments in excess of those to which they were limited, to be regarded as the engagement of their principal? Obviously not—and of this the libellant is chargeable with notice, because he dealt avowedly with representatives, and was bound, at his peril, to know that they kept within the line of their authority.

Although these considerations are decisive against the libellant, an additional objection is made to his recovery, which was not urged in the District Court, and which, it is therefore argued, is not available to the respondents now; as the whole case is brought into this court and is heard *de novo*, and as no assignment of specific errors is required, all the questions arising upon the pleadings and proofs are legitimate subjects of consideration. The objection now urged is distinctly presented by the answer of the original respondent, and seems to have led to the libellant's motion, which was ordered to stand as a supplemental libel against John Lachenmeyer. It has not been waived, and may, therefore, be pressed at any stage of the controversy.

As before stated, Otto Lachenmeyer was merely the organ of his father, John Lachenmeyer, in the correspondence in relation to the charter. He so declares himself in explicit terms, and his correspondents are asked to exert their offices only for the benefit and in the behalf of John Lachenmeyer. He did not propose that they should make any engagements for him. John Lachenmeyer was their principal, whom alone they had power to bind. But the charter party was executed in the name of Otto Lachenmeyer as the charterer, and John

Lachenmeyer is not a party to it. It is not then the contract of Otto Lachenmeyer, because it was unauthorized by him. Nor is it the contract of John Lachenmeyer, because he is not named in it and it does not purport to bind him. This is an awkward dilemma, either horn of which is fatal to the libellant.

The decree of the District Court dismissing the libel is affirmed with costs to be taxed against the libellant.

[Legal Gazette, Oct. 16, 1871, Vol. 3, p. 316.]

Circuit Court of the United States, Eastern District of Pennsylvania.

IN ADMIRALTY.

UNITED STATES v. THE SHIP "STADACONA."

1. By act of Congress of March 2d, 1799, extended to foreign vessels, by act of July 18th, 1866, all masters of vessels are required to have a manifest or manifests of their cargo; and a forfeiture equal to the value of the goods not included in the manifests is imposed.
2. The steward of the ship "Stadacona" carried on board before the ship's sailing, nineteen bundles of silk and concealed them in the ship without the master's knowledge. Upon the ship's arrival at Philadelphia, the goods were seized and condemned. *Held:*
3. That while the smuggled goods were properly condemned and forfeited, they are not to be treated as any part of the cargo within the meaning of the act of Congress. The master cannot be subjected to a personal forfeiture, when he has not done, or omitted to do, anything inconsistent with an honest purpose to discharge his duty.

Opinion by McKENNAN, Cir. J. Delivered October 2d, 1871.

By the 22d section of the act of Congress of March 2d, 1799, 1 Stat. at Large, 644, all masters of vessels, owned in whole or in part in the United States, carrying goods from a foreign port into the United States, are required to have a manifest or manifests of their cargo; and, by the 24th section of the same act, a forfeiture, equal to the value of the goods not included in the manifests, is imposed, "and all such merchandise, not included in the manifest, belonging or consigned to the master, mate, officers or crew of such ship or vessel, shall be forfeited." These provisions are applied also to foreign vessels by the 25th sec. of the act of July 18th, 1866, and, by the 8th sec., the vessel may be holden for the penalty thus imposed.

The object of these laws is to protect the public revenue. Hence it is required of the chief officer of the vessel, that he shall keep a manifest of his whole cargo, in the form prescribed, to facilitate and assure the collection of the duties imposed upon it; and the observance of this requirement is enforced by a

penalty. It is the act or neglect of the master for which the penalty is imposed; for while the goods not in the manifest, belonging or consigned to any of the officers or crew, are forfeited, the master alone is condemned to the payment of a sum in money equal to the value of such goods. The personal forfeiture is the prescribed punishment of his personal delinquency—the unexplained finding of goods on board, not embraced in the manifest, is sufficient primary evidence of his liability to the penalty, but, by the express enactment of the proviso to the 24th sec. above referred to, this may be averted by proof, that no part of the cargo had been unshipped, except as reported by the master, and that the manifests had been lost or mislaid, without fraud or collusion, or that they were defaced by accident or incorrect by mistake.

The motive of the omission is thus made the ultimate test of culpability. It is, therefore, a superficial, as well as harsh, interpretation, which applies to the proofs of the master's faultlessness a standard of literal conformity to the mode of exculpation, which the act indicates, but does not prescribe exclusively, as effectual. If the apparent offence is expunged, the spirit and object of the law are effectually subverted. An omission then to perform the duty imposed upon the master, which proof of an honest mistake or an unavoidable accident will excuse, will be condoned also by proof, which, in like manner, relieves him from all suspicion of corrupt or conscious wrong.

The respondent here is the master of the ship "Stadacona," of Londonderry, Ireland. The night before she sailed from her home port, while the officers of the vessel were on shore, the steward carried on board nineteen bundles of silk, and concealed them in a space between the bread locker and the stairs leading from the cabin to the upper deck. This space was boarded up and covered with tin. In reference to it the master, in his deposition, says, "this place had never been opened to my knowledge. I never imagined it could be opened, and never paid any attention to it." When the vessel was searched by the custom house officers in Philadelphia, this place was discovered and broken open, and the silks were found secreted therein.

There is no contention as to this state of facts, or as to the fair inference from them that the shipment and concealment of the goods were the act of the steward alone, without the participation or knowledge of the master. It is not gainsaid, under such circumstances, that the master could not make an entry of the concealed goods on the manifest, and that his inability to make it did not result from any fault of his—no personal delinquency is imputable to him. While the smuggled

goods then were properly condemned and forfeited, they are not to be treated as any part of the cargo, within the meaning of the act of Congress, for the non-entry of which upon the manifest a penalty is imposed upon the master. He cannot be subjected to a personal forfeiture, when he has not done, or omitted to do, anything inconsistent with an honest purpose to discharge his duty. The District Court rightly so adjudged and its decree is affirmed.

[Legal Gazette, Oct. 6, 1871, Vol. 3, p. 317.]

Circuit Court of the United States, Eastern District of Pennsylvania.

IN EQUITY.

In re PETER CONRAD, BANKRUPT.

Promissory notes were drawn by Flues & Schatte, residents of Philadelphia, for the accommodation of Peter Conrad, also a resident of that city, who endorsed said notes, and had them discounted at usurious rates of interest, by Flues & Co., of New York, receiving the money from them by checks of the latter firm upon a New York bank. Conrad becoming a bankrupt, Flues & Co. presented the notes for proof before the register in bankruptcy, and their allowance was opposed. Upon an appeal from a decree of the District Court of the United States, the court held:

1. Though the notes were drawn, dated, signed and endorsed at Philadelphia, where the drawers and endorser resided, yet, as they were delivered and discounted at New York (not being made with exclusive reference to the laws of either Pennsylvania or New York), the effect was to bring the whole transaction within the dominion of the laws of New York.
2. The transmission of the proceeds of the notes to the parties at Philadelphia, by means of checks on a New York bank, did not change the place of the transaction, as the notes were placed in New York, discounted there, and the money provided and deposited there, and the checks were only the contemplated means employed to facilitate the receipt of the money by the parties in Philadelphia.
3. As the notes were discounted in New York at usurious rates of interest, and are therefore declared void by the laws of that State, Conrad cannot be made liable as endorser, and the claim of indebtedness founded upon said notes is disallowed.

Appeal by Geo. M. Dallas, trustee, from the decree of the District Court for the Eastern District of Pennsylvania, in bankruptcy.

Opinion by McKENNAN, Cir. J. Delivered October 2d, 1871.

There is no ground for contention as to the facts which give rise to the question presented by this appeal.

Peter Conrad, the bankrupt, desiring to raise money to meet certain pecuniary liabilities, made an arrangement with Flues & Co., of New York, to obtain it for him there, by the discounting of notes to be drawn for his accommodation by Flues & Schatte, and endorsed by him. The notes were accordingly drawn, endorsed and dated at Philadelphia, where the drawers and endorser resided, and were sent by mail to

Flues & Co., who discounted them themselves, at usurious rates of interest, and remitted the proceeds to Flues & Schatte, by their checks on the Manhattan bank, New York. Thirteen of these notes remained unpaid in the hands of Flues & Co., who have presented them for proof before the register in bankruptcy, and their allowance is opposed by the trustee of the estate of the bankrupt.

The question now to be determined is, by the law of which place, New York or Pennsylvania, is the liability of Peter Conrad to be governed. If by the law of New York, his liability is altogether avoided; if by the law of Pennsylvania, it is reduced to the amount actually loaned, with legal interest thereon.

As a general rule, the construction and validity of contracts are to be determined by the laws of the place where they are made, unless the parties, by the terms of the contract, had in view a different place. *Thompson v. Ketcham*, 8 Johns. R. 193; *Cox and Dick v. The United States*, 6 Peters, 202. Thus where no place of execution is expressed in a note, it will be governed by the law of the place where it is made, but, if it is made payable at a different place, the rate of interest there will be allowed, and it will be governed generally by the law of that place. This was the principle on which *Mullan v. Morris*, 2 Barr, 85, was determined. But this rule is applicable only to *bona fide* contracts, to which effect would be given by the laws of the place at which they are to be performed.

In *Andrews v. Pond*, 13 Peters, 65, the action was against the endorsers of a bill of exchange, drawn, dated, and negotiated at New York, and payable at Mobile, which was usurious, both by the laws of New York and Alabama. Chief Justice Taney, delivering the opinion of the court, says: "Now, if this defence is true" (that the contract was not made with reference to the laws of either State, and was usurious by the laws of New York), "and shall be so found by the jury, the question is not which law is to govern in executing the contract, but which is to decide the fate of a security taken upon usurious agreement, which neither will execute. Unquestionably, it must be the law of the State where the agreement was made, and the instrument taken to secure its performance. A contract of this kind cannot stand upon the same principles with a *bona fide* agreement, made in one place to be executed in another. In such cases, the legal consequences of such an agreement must be decided by the law of the place where the contract was made. If void there, it is void everywhere."

The notes in controversy were not made with exclusive reference to the laws of Pennsylvania or New York; and it is undoubted, that, as usurious contracts in both States, they would

not be executed by the laws of either. The only and decisive inquiry then is, where were they made? They were drawn, dated, signed, and endorsed at Philadelphia, where the drawers and endorsers resided. But had they any efficacy there? Did they there impose any obligation upon these parties to pay the sums stated on their face? Were they there evidences of indebtedness to any one? Clearly not, because, until they passed out of the hands of the persons who made them, they belonged to them, and did not bind them to pay anything to anybody, and would not sustain any action upon them. They were not contracts, because there was only one party to them. Something else was essential to impress upon them the character and qualities of a contract. That was their transfer to some one else for a valuable consideration. They then became for the first time, promises to pay. Before, they had no legal existence; by that fact, they were brought into life, and invested with the obligation and validity of promissory notes. Now, there was no transfer of these notes in Philadelphia, because, not only was it agreed that the money was to be raised upon them in New York, but they were sent there to Flues & Co., to be negotiated according to the previous arrangement. Until they were delivered to Flues & Co., they could not be negotiated. They were discounted and delivered at New York, and then only was any obligation to pay them imposed upon the drawers and endorsers, and did they become effectual as contracts. The effect, then, is to bring the whole transaction within the dominion of the laws of New York.

In its main features, *Ludlow v. Bingham*, 4 Dallas, 41, strikingly resembles the present case. There the notes in question were dated and signed by Bingham, at Philadelphia, where they were also endorsed by the payee, but they were delivered to Duer, in New York, in payment of Bingham's indebtedness to him. Ch. J. McKean, in delivering the unanimous opinion of the court, says: "It appears, then, that although the note was signed in Philadelphia, it was not delivered in Pennsylvania; but that the delivery was made by the order or direction of Henry Knox, the payee, to William Duer, in the city of New York, in pursuance of a contract, and for a valuable consideration. It is certain that the bare signing of a note will not give it efficacy. It may be signed with a view to deliver it to the payee, on his complying with some previous stipulation; so that in case of a refusal, it would become useless, and might be cancelled by the drawer. A note is not, therefore, obligatory and valid, until it has been actually delivered to the party for whose use it is drawn; and as it receives its life, existence, and negotiable character at the place where it is so delivered, the law of that place must regulate all its subsequent opera-

tions. Hence, we consider the present note, as having taken effect in New York, as being liable to the *lex loci* of that State (whether depending in positive statutes, or the adoption of the general commercial law), and as exempt from the provisions of our act of Assembly, by which an endorsee is liable to all the equity that the drawer could enforce against the payee."

Davis, Brooks & Co. v. Clemson, 6 McLean, 622, was ruled by the same principle. Clemson, a resident of Ohio, there drew and endorsed a bill on Suydam, Sage & Co., of New York, and sent it to them to be negotiated for their accommodation. They accepted it, and passed it to the plaintiffs in New York, for a usurious consideration. The court held, that the "bill was blank paper when it was transmitted by Clemson to Suydam, Sage & Co., and after it was accepted by them, it was nothing more than blank paper. It was intended for the benefit of the acceptors, but thus far, there was no liability by the drawer, endorser, or acceptors. No action could be sustained on it. It was then, in contemplation of law, no contract or bill of exchange. Until negotiated, it was, in effect, blank paper." It was, therefore, adjudged that the bill was to be considered as made in New York, and to be governed by the laws of that State. To the same effect are *Cook v. Litchfield*, 5 Sand. 337, and numerous other cases, to which it is unnecessary to refer. They uniformly affirm the rule that a bill or note becomes effectual only by negotiation and delivery, that it is to be treated as made at the place where it is so negotiated, and that the law of that place, except in cases of *bona fide* contracts by which a different place of performance is fixed will govern it.

But it is sought to avert the application of the principles recognized in these cases, by the argument that, as the proceeds of the notes were remitted through the mail to Flues & Schatte, at Philadelphia, by Flues & Co., by checks on a New York bank, the consideration did not pass, and the usurious act was not complete until the receipt of these checks, and that thus the situs of the transaction was fixed in Philadelphia. The transmission of the checks was the final act of performance by Flues & Co. of an agreement to which Conrad had previously given his assent, and which he had executed by the delivery of the notes to them in New York. Nothing remained to be done on either side to make the transfer of the notes effectual. Whenever Flues & Co. resolved to discount the notes and put the proceeds, in the form of their *bona fide* checks beyond their control, in course of transmission to Flues & Schatte, through a channel sanctioned as well by commercial usage as by the obvious understanding of the parties, in contemplation of law, the negotiation was complete, and they were the holders of the

paper. The notes were placed in New York; they were there discounted; the money for that purpose was provided and deposited there, and the checks were only the contemplated means employed to facilitate Conrad's receipt of it there. There is nothing, then, to change New York as the place of the transaction; and Flues & Co. cannot complain that they are to be governed by the law of their own State.

As these notes were discounted in New York, at usurious rates of interest, and are, therefore, declared void by the law of that State, Conrad cannot be made liable as their endorser. The first exception made by the trustee of the bankrupt's estate to the report of the register, is sustained, and it is decreed, that the endorsement by Peter Conrad, of the notes held by Flues & Co., numbered in the record 1 to 13, inclusive, and set forth in their affidavit for proof of debt, is void, and of no effect, and the claim of indebtedness of said Flues & Co., founded upon said notes, be disallowed, and that the costs of this appeal be paid by the appellants.

[Legal Gazette, Oct. 13, 1871, Vol. 3, p. 331.]

Circuit Court of the United States, Eastern District of Pennsylvania.

IN EQUITY.

GEORGE M. DALLAS, TRUSTEE, v. FLUES & CO.

A bill for specific relief to compel the respondents to release, surrender, and convey to the trustee of a bankrupt's estate, certain property conveyed by the bankrupt to them, to secure the payment of their claim, or in the event of their not doing so, that their claim be disallowed, was dismissed, the court having decided upon an appeal by the complainant that the claim of the respondents was void.

Opinion by McKENNAN, Cir. J. Delivered October 2d, 1871.

The specific relief sought by the complainant, is the release, surrender, and conveyance to him, as trustee of the estate of Peter Conrad, a bankrupt, of certain real estate and personal securities conveyed and transferred to the respondents by the bankrupt, to secure the payment of several notes endorsed by him and discounted by them. It is asked on the ground, that the respondents have proved their whole claim against the bankrupt, and that this is a conclusive election by them to abandon their securities; and that they cannot assert their claim upon the bankrupt's assets, until they surrender such securities to the complainant, for the benefit of all the creditors.

As the complainant, by his appeal from the decree of the

District Court, has invoked the judgment of this upon the validity of the respondents' claim, and as it has been adjudged to be void and not entitled to allowance, it is unnecessary to pass upon the complainant's right to the relief prayed for. Transfer of their securities to the complainant, or disallowance of their debt, are the alternatives, a choice of which it is sought to impose upon the respondents, but as the last one has been enforced upon them by the decree in the appeal, the prayer in the bill cannot be granted.

The bill is, therefore, dismissed.

[Legal Gazette, Oct. 13, 1871, Vol. 3, p. 332.]

Circuit Court of the United States, Eastern District of Pennsylvania.

IN ADMIRALTY.

THE SCOTTISH BRIDE v. THE ANTHONY KELLY.

A collision having occurred between two vessels, one of which was at anchor, with a number of other vessels, the court, upon libels being filed, and an appeal from the decree of the District Court upon them, *held* :

1. That the incautious navigation of the moving vessel, in a place that required cautious movement, was negligence, and in this case was mainly the cause of the collision.
2. The fact of the light of the vessel at anchor not being in conformance to the statutory requirement, is not sufficient to make the vessel pay her proportion of the damages, if such defect did not co-operate in causing the collision.

Appeal by respondent from the decree of District Court for the Eastern District of Pennsylvania.

Opinion by McKENNAN, Cir. J. Delivered October 2d, 1871

This is a case of collision, in which cross-libels have been filed, each party seeking to cast the whole blame of the disaster upon the other. The District Court made a decree in favor of the Anthony Kelly, and dismissed the libel of the Scottish Bride. I think this decision was right.

Presumptively the Scottish Bride was in fault. The collision occurred shortly before daylight, in the breakwater harbor in Delaware bay, where the Anthony Kelly and a number of other vessels were at anchor, and where there was abundant anchorage ground and sea room for any necessary evolution. A vessel, then, having the control of her own movements, navigated with ordinary skill and care, it would seem at least, ought to have been able to keep out of the way of a vessel at rest. This presumption is strongly reinforced by the proofs.

Did the Anthony Kelly contribute to the injury complained of? The only ground on which such an imputation can rest is the alleged defectiveness of her signal light. She displayed a

single white light, as required by the act of Congress, indicating that she was at anchor, but in the dimensions and condition of her lantern she did not conform to the statutory requirement. In this respect only did she fall short of her duty. *Prima facie*, then, she also was in fault, and must be adjudged to pay her proper proportion of the damages, unless it is apparent, from all the circumstances, that her delinquency did not co-operate in causing the collision—in other words, that it was altogether due to the unskilful or careless navigation of the moving vessel.

The Anthony Kelly was not the only vessel at anchor in the harbor. A number of other vessels were near her, whose lights were visible. Some of them were confessedly seen by the Scottish Bride, and thus she was sufficiently admonished of the necessity of cautious movement; and yet her course was directed to a place of anchorage among them, and was pursued with a rate of speed from which the danger of collision was inseparable. To this the collision complained of is mainly to be ascribed. At the distance at which the act of Congress prescribes that a signal light should be discernible, it is a fair inference that the course or speed of the Scottish Bride were not controlled or influenced by the observation, or the failure to observe, any single light. Her place of anchorage must have been selected and her movements to reach it must have been determined only when she came near enough to the Anthony Kelly to be able to see her light—and this, I am led to the conclusion from the exhibition of the lights at the hearing in court, she could do at the distance of several hundred yards, if she had kept a proper look-out. Sufficient space and warning were thus given her to avoid a collision; but, heedlessly or wilfully, she did not avail herself of them, and so she alone is blamable for the consequences. This culpability is not mitigated by the technical fault of the Anthony Kelly. Practically, then, no contributory delinquency is imputable to the Anthony Kelly, but to the incautious or reckless navigation of the Scottish Bride the injury complained of is altogether to be ascribed.

This was the conclusion reached by the District Court; and its decree dismissing the libel of the owners of the Scottish Bride against the owners of the Anthony Kelly is affirmed.

And in the libel of the owners of the Anthony Kelly against the owners of the Scottish Bride it is now decreed that the libellants recover of the respondents and their stipulators the sum of eighteen hundred and forty-three dollars and two cents, with interest from March 1st, 1870, and costs.

Morton P. Henry, Esq., for the Anthony Kelly.

J. Warren Coulston, Esq., for the Scottish Bride

[Legal Gazette, October 13, 1871, Vol. 3, p. 334.]

Circuit Court of the United States, Eastern District
of Pennsylvania,

IN EQUITY.

FRANCIS et al. v. MELLOR et al.

1. Patents are to be construed liberally, so as to sustain, and not destroy the right of the inventor.
2. As a general rule, the explanations contained in the specification, are to be taken as the inventor's own interpreter of the meaning of his claim, and of the essential qualities of the invention protected by his patent.
3. As the proper adjustment of *proportions* of the ingredients used in complainants' invention, is essential to its sufficiency, an admission by the respondents that they manufacture certain compositions, from the same ingredients as those used by complainants, but that the proportions are different, and that their compositions are substantially and materially different, is not an admission of infringement, but a denial.

Opinion by McKENNAN, Cir. J. Delivered October 2d, 1871.

The respondents are charged with the infringement of re-issued letters patent No. 3576, dated August 3d, 1869, and No. 2805, dated Nov. 26th, 1867, for new and useful compositions of matter. The original of the first of these re-issues, No. 41,887, was issued March 8th, 1864, and was surrendered and re-issued September 27th, 1864, in two divisions, No. 1771 and 1772. No. 1772 was again surrendered and re-issued February 28th, 1865, which was also surrendered and re-issued in its present form. No. 2805 is a re-issue of No. 43,192, dated June 21st, 1864.

The respondents opposed a decree in favor of the complainants upon several grounds, involving the validity of the re-issued patents, and the novelty and utility of the alleged inventions, but, in view of the state of the proofs, I do not consider it necessary or proper to consider them. Irrespective of these grounds the case must be decided against the complainants. Whatever may be the merits of their inventions, however defensible their title, they have failed to prove that the respondents are infringers.

The claim of 2805, as limited by a disclaimer of the patentees, is for a composition for printing purposes, combining glue, glycerine and molasses. The bill alleges that the respondents have made, used or sold a composition embodying these ingredients, but this, in the words of the interrogatory of the bill, the respondents deny. No proof is produced by the complainants of the truth of their averment, and this patent, therefore, must be put out of the case.

The claim of 3576 is for "combining glue, glycerine and sugar, or any other analogous saccharine matter, to form a new and useful composition of matter for various purposes."

With the infringement of this claim the respondents are charged, and they answer, "that they have for about—years been engaged, in the city of Philadelphia, in the manufacture of composition for printers' inking-rollers, said composition containing, with other ingredients, the common, and for the last twelve years past, well known ingredients for such purpose, glue, glycerine and sugar, employed in varying proportions, but in no case, in proportions or in a mode, conforming to those specified in the said plaintiffs' said respective letters patent; and defendants further aver, that the said compositions so made and sold by them were, and are, substantially and materially different from the compositions described and claimed in said plaintiffs' said respective letters patent." This answer is treated by the complainants as an admission of infringement, and no proof has, therefore, been taken in relation to it.

That the complainants have succeeded in producing a valuable composition, adapted to various useful purposes, is beyond dispute; but whether they are justified in treating the respondents' answer as a confession that they have made and used it, depends, necessarily, upon the construction of the patent.

Patents are to be construed liberally, so as to sustain, and not destroy, the right of the inventor. Hence the whole of the specification may and should be looked at, to learn from the description of the invention not only how to make it, but to ascertain what it really is. By the requirements of the statute the description must be in full, clear and exact terms, and it is, therefore, an authorized guide to an accurate comprehension of what the patentee meant to claim as his invention. It is not only where the specification is expressly referred to, that the claim is to be construed in connection with it, but, as a general rule, the explanations contained in it are to be taken as the inventor's own interpreter of the meaning of his claim, and of the essential qualities of the invention protected by his patent. *Turril v. R. R. Co.*, 1 Wall. 511; *Curtis on Patents*, secs. 453 and 454.

The claim in this case is for combining glue, glycerine and sugar, or any other analogous saccharine matter, to form a composition for various purposes. In the body of the specification the proportions in which the ingredients are to be combined, are given approximately, thus:

"Glue	15 pounds.
Glycerine	30 "
Sugar, or other analogous crystallizable matter	7 "

But it is stated that "it is not intended to confine the patent to the use of the ingredients specified in the proportions speci-

fied, as those proportions may, in some cases, be advantageously varied."

It is plain that the patent is not for the mode or process of making the composition. It is for a composition embodying glue, glycerine and sugar. But is it broadly for a substance containing these ingredients, without regard to the proportions in which they are combined, or is it for a substance produced by their conjunction, in substantial or approximate accordance with the formulas given in the specification?

If the claim is to be construed in its broadest significance, it is difficult to see how this re-issued patent can be sustained. It is the third re-issue of a patent, whose claim is for the use or employment of glue, glycerine, castor oil, or any fixed oil, ammonia, borax and sugar, when combined to form a composition for the manufacture of printers' inking rollers. Now, if the composition claimed in the re-issue is to be treated with reference exclusively to its constituent parts, it is not identical with the composition for which the original patent was granted. A compound of glue, glycerine and sugar is not physically the same as a compound consisting of these ingredients, with a fixed oil, ammonia and borax added to them. They can only be regarded as the same in another sense, as possessing like special and distinguishing properties, and like adaptability to the uses for which they are designed. While characteristic resemblance is preserved, they may, perhaps, be considered as identical, within the meaning of the patent law, although one of them may not contain some of the constituents of the other, which are not necessary to impart to it peculiar attributes.

The patent, however, should be so construed as not to avoid it. That conclusion can be averted, by interpreting it as claiming a composition of matter, distinguished by new and useful qualities, which are the product of the conjunction of certain elements, in prescribed relative proportions.

It is apparent that the complainants have produced a substance of great practical excellence, possessing peculiar and valuable properties; and that these constitute its patentable merit. The complainants cannot successfully claim to be the first to compound glue, glycerine and sugar; but they may claim to have discovered that these elements may be combined in such proportions as to yield a new product. Charles and Nelson Goodyear conferred inestimable benefit upon the world by the production of substances, respectively known as hard and soft rubber. They were not the first to combine the constituents of these substances, but both were treated as original inventors, although their inventions were the product of a combination of the same elements, native india rubber and

sulphur. But the proportions in which these elements were combined, were different, and the result was a product possessing distinct properties; and applicable to different uses, and so they were each regarded as patentable substances.

The distinctiveness of the complainant's invention must, in like manner, be determined by its inherently new and useful attributes. It is described as uniting elasticity, firmness, "suction," freedom from the influence of atmospheric changes, susceptibility of re-casting, and therefore of indefinite use; and that thereby it is distinguishable from other compositions used for like purposes. That these properties are due to an empirical combination of glue, glycerine and sugar cannot be maintained. They are the product as well of the graduated proportions, as of the mechanical union, of these ingredients. Glycerine must be used in excess of either of the other ingredients, or the compound will lack some of its most valuable qualities. And it may be said of the other ingredients, that they must be employed in proper relative proportions to secure the characteristic merits of the product. These are obvious deductions from the testimony of the complainant, Francis.

As the proper adjustment of proportions, then, is essential to the efficiency of the invention, it is a reasonable construction of the patent to expound it as claiming substantial conformity to the specified proportions of glue, glycerine and sugar, as well as their conjoint use, in producing the described result. Exact conformity to these proportions is not required, because they are stated as approximate, and the right is claimed to vary them. But this right is not unlimited. It can only extend to any adjustment of proportions, which will result in the production of a substance possessing the peculiar properties attributed to the substance described in the patent. Substantial identity of result is the test of substantial conformity to the mode of combination prescribed in the specification.

The respondents deny that, in making the compounds used by them, they have conformed to the proportions, or adopted the mode, specified in the patent, and they aver, that their compositions are *substantially* and *materially* different from that described and claimed by the complainants. In view of the construction given to the patent, this is not an admission of infringement, but a denial, that, either in the proportions or mode of combination observed, or the result produced, the compositions made and used by them are the same as the compositions claimed by the complainants. This denial imposed upon the complainants the burden of proving the fact of infringement; but, as they have furnished no proof of it, they have failed to sustain their bill, and it must, therefore, be dismissed, with costs.

Decreed accordingly.

Horace Binney, 3d, and George Harding, Esqs., for complainants.

Charles Howson and Furman Sheppard, Esqs., for defendants.

FRANCIS et al. v. MAHN.

Opinion by McKENNAN, Cir. J., Delivered October 2d, 1871.

The same reasons which are assigned for the dismissal of the bill in *Francis & Loutrel v. Mellor & Rittenhouse*, govern the decision of this case. The only difference between the cases is, that in this one the contested denial of infringement applies to No. 2805, and in the other to No. 3576. In every other essential particular they stand upon the same footing. The complainants have not adduced any evidence to disprove the respondent's denial of infringement, and their bill must; therefore, be dismissed with costs, and it is so decreed.

[Legal Gazette, Oct. 13, 1871, Vol. 3, p. 335.]

Court of Common Pleas, Philadelphia County.

IN EQUITY.

SECOND AND THIRD ST. PASSENGER RAILWAY CO. v. MORRIS.

An Injunction, restraining the temporary blocking up of the streets of the city of Philadelphia, by hauling bulky articles over them, was dissolved.

Statement of the case.

The proprietor of the Southwark Foundry, in this city, upon September 29th, 1871, sent a notice to the secretary of the Second and Third Street Passenger Railway Co., that upon a certain day, he would be compelled to occupy a portion of Third street, from Washington avenue to Reed street, for the purpose of hauling a large boiler, of great weight, from his foundry to the steamship Yazoo, lying at the foot of Reed street wharf, and that it would necessarily cause an obstruction of the railway track, and prevent, for a short time, the running of the company's cars. Upon receipt of this notice, the railway company caused a bill in equity to be filed in the Court of Common Pleas, praying for an injunction to restrain the hauling of said boiler or any similar load or loads over and along Third or Second street, claiming to possess, under authority of an ordinance of councils, passed April 1st, 1859, such a right of way over said streets as would virtually exclude the defendants from hauling said boiler over any portion of those streets. Upon this bill in equity being filed, the usual *ex parte* five days' injunction was granted. Upon a motion to continue this injunction, it was argued by John L.

Shoemaker, Esq., on behalf of the railway company, that great pecuniary loss to the company, and inconvenience to the public would ensue from the stoppage of the cars, and the passage of such a heavy weight would injure the public highway (which the company, by ordinance of councils, is obliged to keep in repair). It was further argued, that the public sewer under Third street would be greatly endangered, and that the defendants could, without inconvenience, use other streets.

On behalf of the defendants, it was argued by Chas. E. Morris and Henry J. McCarthy, Esqs., that the railway company had no such right of way over the streets named, as would prevent citizens from using them as public highways in the lawful exercise of their business. It was further argued, that if such a right of way has been granted by the ordinance referred to, the ordinance is void, being in restraint of trade, and because councils, having power over the streets for police purposes only, cannot grant such a right of way.

Opinion by PEIRCE, J. Delivered October 9th, 1871.

It is alleged, that the two boilers of defendant can be safely hauled down Third street without injury to the sewer or the ground, and that by crossing at the foundry to the north side of Washington avenue, the length of time on Third street will be reduced to about fifteen minutes. This interruption to complainant's cars is comparatively brief. The inconvenience and injury arising from the continuance of this injunction would, therefore, be much greater to Henry G. Morris. It is certain that somebody must be impeded and interrupted. Some drivers of vehicles will be compelled to turn out on any route to Reed street wharf which may be selected. The delay incidental to the hauling of such large articles through the streets, is not limited to the Second and Third Street Passenger Railway Company, but extends to other roads, and it seems to me that the route selected offers the most ready facilities for the conveyance of the boilers, with the least interference to the public convenience. The great and fundamental question raised by the bill, is the right of Mr. Morris to use the streets of the city for his business. Of course, on a preliminary hearing, one judge of a court of equity ought to be careful to do nothing to interfere with this right; ought to proceed with deliberation and care, and only after due consideration. If I were convinced of the danger to the streets, I would hesitate to do what I am about to do now. But I have the opinion of the proper city officer, the surveyor of the district, that these boilers can be safely hauled on the streets. Weighing that and the necessity of the case, and the great loss to Mr. Morris and the steamship company, with the alleged injury to the railway company, I cannot discriminate against the defendant or against other railway

companies. This decision is not final. The business of the Southwark Foundry only goes forward until this question can be properly decided on final hearing. I think it my duty to dissolve this temporary injunction, without prejudice, however, to complainants to move to renew it, if the hauling of the first boiler should show cause to do so. I would suggest that they amend their bill, if necessary, so as to raise the broad question of the right of the defendant to use the public highways of the city, for the purpose of conveying along them, the huge boilers which he manufactures.

The injunction is, therefore, dissolved.

[Legal Gazette, Oct 13, 1871, Vol. 3, p. 334.]

Register's Court, Philadelphia County.

In re McCARTER'S WILL

1. Facts touching the validity of a will being averred in a *caveat* filed by the contestants of the will and denied by the parties offering the will for probate, the appeal from the register's decision awarding an issue, is dismissed, the court being of the opinion that the testimony is of a character, which on a formal request for an issue, should be submitted to a jury.
2. A formal request for an issue directed to be filed *nunc pro tunc*.

Appeal from the decision of the register awarding an issue.

Opinion of the court by PEIRCE, J. Delivered October 14th, 1871.

Two questions are raised by this appeal, viz. :

1. Whether there is any matter of fact touching the validity of this will which will justify the register in directing a precept to the Court of Common Pleas for an issue to try the fact.
2. Whether such an issue can be awarded, except upon the request of a party interested.

The caveat filed in this case avers :

1. That the said paper writing purporting to be the last will and testament of the said John McCarter, deceased, is not his last will and testament.
2. That the said paper writing was signed (if signed by the said John McCarter) through and by the undue influence of one or more persons.
3. That the said John McCarter, at the time of the alleged signing of said paper writing, purporting to be his last will and testament, was not of a sound disposing mind or memory, and was not at the said time competent to make a last will and testament.

These facts are averred on the one side and denied on the other, and are material questions touching the validity of this will.

The evidence which has come up with the appeal shows that on some of the averments of the *caveat* the testimony is of a character, which, on a formal request for an issue, should be submitted to a jury for determination.

But it is alleged that there is no request for an issue, and that the register cannot award it, except at the request of a party interested. There does not appear among the papers any formal request in writing for an issue, but the register, in his opinion in this case, says that a demand for an issue was made.

It is certainly much more regular that a formal request in writing should be made, setting forth the facts touching the validity of the alleged will, respecting which an issue is asked, than that an oral demand or request should be made in the course of the proceedings before the register. The formalities of the civil law, of which the probate of wills is a part, required that all the proceedings should be in writing, for greater certainty and more accurate determination. This is especially necessary when a precept is issued from one jurisdiction into another to try matters of fact touching so important a matter as the validity of a will. This appeal is dismissed, and the contestants are directed to file with the register, *nunc pro tunc*, a formal request in writing for an issue, setting forth the facts touching the validity of said will, which they object against it.

[Legal Gazette, Oct. 20, 1871, Vol. 3, p. 341.]

Register of Wills, Philadelphia County.

IN RE McCARTER'S WILL.

Opinion by WM. M. BUNN, Register of Wills. Delivered September 25th, 1871.

In the matter of the probate of a certain paper writing, alleged to be the last will and testament of John McCarter, deceased.

In this case, after the proof of the execution of the will by the subscribing witnesses, the contestants, who are children of the testator, produced testimony with reference to his mental condition in June, 1865, at or about the time of the execution of the will. The substance of this testimony was, that the testator was at that time about eighty-two years of age; was engaged in farming in Bucks county; that from some time prior

to the date of the will he became enfeebled in intellect, was childish, forgetful, and in the opinion of the witnesses incompetent to make a will. Some of the witnesses testify, that this condition was attributed by a physician who attended him at the time (and who was afterwards examined by the proponents of the will), to the effects of a sunstroke, and consequent softening of the brain, received while at work in the sun. One witness testifies to having called upon him with reference to the transaction of some business, but was obliged to give it up in consequence of his inability to secure the attention of the testator, or rather, in the language of the witness, because he could not succeed in reaching his understanding; this was in 1862 or 1863, and the same witness says, I saw him frequently after that and cannot say I ever saw him a sane man afterwards. Another witness testified, that he was a perfect child, mentally and physically.

To rebut this, the proponents of the will produced the doctor who was in attendance upon the testator upon the occasion of the alleged sunstroke; he testified that the decedent had no sunstroke, but was suffering from the effects of overwork in the sun. That when he arrived, having been sent for, he examined him, found no occasion to prescribe for him, and having advised him of his imprudence, and warned him of the danger of such action by a man of his years, left him. He had been in the habit of conversing with him, considered him a good business man, had no doubt of the soundness of his mind, and saw no change in him until about eighteen months before his death, which occurred some four or five years afterwards. He also denied that he ever said decedent had suffered from sunstroke, softening of the brain, or any other disease calculated to impair his mental faculties as had been asserted by some of the other witnesses.

The remaining witnesses for the will testified generally to their belief in his mental soundness, and some of them detailed the circumstances of a business transaction by the testator, the purchase of a property by him several years after the execution of the will offered for probate. There was some testimony also upon the part of the contestants, calculated to show that the children who support the will, and who are principally benefited by it, endeavored to restrict testator's intercourse with his other children, and generally, undue influence; but, as this was not directed to the time, or even *about* the time of the execution of the will, the register does not attach much importance to it. If the questions to be decided by the register were whether the execution of the will is properly proven, and whether the testator was of sound mind and free from restraint or undue influence at the time of the execution of the same, he would have

no hesitation upon all the testimony in deciding in the affirmative and admitting the said will to probate, but the contestants, availing themselves of their rights under the act of Assembly, demand an issue, and ask the register to issue his precept to the Court of Common Pleas, commanding them to frame one, and cause the same to be tried in the manner directed by law.

It is true that the register is not required to issue such precept whenever the same may be demanded; he is, in the language of the cases upon the subject, which are many and so familiar as not to require reference, *empowered*, but not obliged to do so.

But he is not to assume the functions of a jury and try the case himself. He should examine carefully the testimony, and if he should be clearly of the opinion that the court would not enter a judgment upon a verdict against the validity of the will, if such a verdict were found by a jury upon a trial of an issue of *devisavit vel non* he ought to decline to issue his precept, otherwise it would be his duty to comply with the demand for an issue.

In this case, he is not prepared to say that the court would not enter a judgment upon a verdict against the will, should such a one be rendered, and therefore, regardless of the impression produced by the whole testimony upon his own mind, he considers it his duty to award the precept asked for.

The demand for an issue will, therefore, be complied with, and for the present the will cannot be admitted to probate.

[Legal Gazette, Oct. 20, 1871, Vol. 3, p. 341.]

Court of Common Pleas, Philadelphia County.

STITES v. JEFFRIES et al.

1. An execution will not issue against the separate property of the wife for her debt for necessities for support of her family, until judgment be obtained against both husband and wife, and the property of the husband be first exhausted.
2. The husband not being served with process, the judgment against the wife alone is void, and the want of jurisdiction in the court to confirm such judgment, may be taken advantage of at any stage of the proceedings.

Rule for judgment against garnishees on answers to interrogatories.

Opinion of the court by PIERCE, J. Delivered October 14th, 1871.

The garnishees in their answers admit that the amount in their hands to the credit of Emily Jeffries, the wife defendant, exceeds the amount of plaintiff's claim, but aver that the proceeding is defective, because it appears from the record

that R. N. Jeffries, the husband defendant, had never been served with process, and that judgment had been entered against the said Emily, his wife only, contrary to the act of Assembly, in such case made and provided. The act of 11th April, 1848, provides the manner in which the separate property of the wife may be made liable for necessities for the support and maintenance of the family of any married woman. It provides that the debt must have been contracted by the wife; that the husband and wife shall be jointly sued; that execution shall first go against the husband alone, and if no property of the husband can be found, that an alias execution may be issued and levied on and satisfied out of the separate property of the wife.

It follows that if no judgment has been obtained against the husband, that no execution can issue against the separate property of the wife, for her estate is only liable if no property of the husband can be found, after judgment obtained against both of them.

But it is said that judgment in this case against the wife was affirmed in this court on *certiorari*, and that therefore she and all other parties are estopped from denying its validity, or preventing the fruit of it being reaped by execution. A judgment rendered by a court or alderman in a case in which it or he has no jurisdiction is no legal judgment, and advantage of the want of jurisdiction may be taken at any stage of the proceedings. Even if it were possible to treat the judgment as valid, execution could only issue in the manner prescribed by the act, and as there is no judgment against the husband, the judgment against the wife would stand upon the record as a fruitless judgment. It is further alleged that the garnishees cannot set up this want of jurisdiction, as they would be protected in payment of the money by the judgment and execution of this court. But a judgment or execution when there is a want of jurisdiction is void, and payment under it cannot be justified. And the garnishees are right in setting up this want of jurisdiction.

This rule is discharged.

Court of Common Pleas, Philadelphia County.

In re assigned Estate of SNYDER & CADWALLADER.

A claim for rent of premises occupied by the assignors, which fell due after an assignment by them for the benefit of creditors, is not entitled to have a dividend paid upon it, as the agreement to pay the rent is not an agreement to pay a debt.

Exceptions to auditor's report.

Opinion by PEIRCE, J. Delivered October 14th, 1871.

The question raised by these exceptions is whether the assigned estate is liable for the payment of rent of premises which had been occupied by the assignors, of which the assignee had never taken possession, and which rent fell due after the date of the assignment.

On the 1st of September, 1870, Snyder & Cadwallader made an assignment for the benefit of the creditors. On the 1st of October, 1870, a quarter's rent fell due; another quarter's rent fell due January 1st, 1871. A further claim was made for rent to January 30th, 1871, at which time one of the assignors, who had kept the key in his possession, surrendered it to the owner.

The claim made on behalf of the owner was that the rent was a preferred claim, and should be paid in full; and if not entitled to be paid in full, then a dividend should have been declared upon the whole amount of rent claimed.

The auditor awarded a dividend upon the quarter's rent due October 1st, 1870.

This claim was made upon the assumption that an agreement to pay rent is a contract to pay a debt; but in *Bosler v. Kuhn*, 8 Watts & Sergeant, 186, it was held that "a landlord could not prove for the coming rent as a holder of a debt payable in *futuri*. A rent service is not a debt; and a covenant to pay it is not a covenant to pay a debt; it is a security for the performance of a collateral act. The annual payments spring into existence and for the first time become debts when they are demandable, for while they are growing due the landlord has no property in anything distinct from the *corpus* of the rent; or the realty of which they are the produce; and the fruit must be severed from the tree which bears it before it can become personal property and a chose in action." *Bosler v. Kuhn* was a proceeding on a ground rent in fee. But there is no difference in principle between a ground rent in fee and rent reserved upon a term for years. Both are rents service. It is further manifest that a rent differs from a debt in this, that rent is extinguished or suspended by an unlawful entry of the

landlord upon the demised premises; an effect which would not be produced if the rent were a debt.

As this was an assignment for the benefit of creditors, and there was certainly no debt due by the assignors in respect of the rent which became payable after October 1st, 1870, the landlord was not entitled to a dividend thereon.

The exceptions are dismissed.

[Legal Gazette, Oct. 20, 1871, Vol. 3, p. 344.]

Court of Common Pleas, Philadelphia County.

ESLER v. PETERSON.

A lien filed upon December 2d, for a claim dated June 2d, is within the six months required by the mechanics' lien law, the first day being excluded and the last day included in the six months.

Rule to strike off mechanics' lien claim.

Opinion of the court by PEIRCE, J. Delivered October 14th, 1871.

It ought to be considered as settled law in Pennsylvania, that if an act is to be done, or a date computed after another given date, that the first day is to be excluded and the last included. *Cromelien v. Brink*, 5 Casey, 522; *Duffy v. Ogden*, 14 P. F. Smith, 240.

The mechanics' lien law enacts that "every such debt shall be a lien as aforesaid until the expiration of six months after the work shall have been finished, or materials furnished." The last item of charge in this claim was June 2d, 1870, and the claim was filed December 2d, 1870. Excluding the first day and including the last, according to the rule, this was in time. As was illustrated in *Cromelien v. Brink*, if the act required that the claim should be filed one day after the work had been finished or materials furnished, it could scarcely be said that a day had been given if a court should decide that the claim must be filed on the same day on which the work was done or materials furnished.

The rule is discharged.

[Legal Gazette, Oct. 20, 1871, Vol. 3, p. 344.]

Court of Common Pleas, Philadelphia County.

HENRING & CO. v. DITTMAN.

A demurrer to a declaration which averred a promise by the defendant to the plaintiffs to pay a debt of another person on consideration, that the plaintiffs would cease to prosecute a certain action brought by them against that person for the debt, but which did not aver that said promise was in writing, is sustained, the act of April 26th, 1855, requiring such promise to be in writing in order to sustain an action.

Demurrer to declaration.

Opinion of the court by PEIRCE, J. Delivered October 14th, 1871.

The plaintiffs declared that the defendant, in consideration that the plaintiffs, at the request of the defendant, would cease to prosecute a certain action brought by them against one Wm. L. Carpenter, and which was then pending before Alderman Allison, for the sum of \$99.50, for a debt due by said Carpenter to said plaintiffs, and would stay all further proceedings therein, undertook and promised the plaintiffs to pay them the said debt and the costs of such action. And the plaintiffs aver that they, confiding in the said promise of the said defendant, did then cease to prosecute the said action, and have thence hitherto stayed all further proceedings therein, whereof the defendant had notice, &c.

To this declaration the defendant has demurred that the said plaintiffs allege or promise by the defendant to the plaintiffs to pay the debt of the said Wm. L. Carpenter, without averring that said promise was in writing.

The question raised by this demurrer is whether the promise alleged to have been made by the defendant is required to have been made in writing.

The act of 26th April, 1855, declares that "No action shall be brought whereby to charge any executor or administrator upon any promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt or default of another unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person by him authorized."

What constitutes a promise to pay the debt of another within the meaning of the statute has been well considered by Strong, J., in the case of *Maule v. Bucknell*, 14 Wright, 39. There seems to be at least four principal classes of cases where the promise to pay the debt of another need not be verified by being reduced to writing and signed by the promisor.

1st. Where the debt is an absolute purchase by the promisor, so as to leave in the promisee no claim of right or title to the debt.

2d. When there is an extinguishment of the debt, and the new promise is accepted in lieu of the claim on the original debtor.

3. When there is a transfer to the promisor of a fund for the payment of the debt, or property or securities charged with its payment.

4th. When there was some liability of the promisor or his property, independent of his express promise; or that he had become the actual debtor, so that, as between him and the original debtor, the superior liability was his.

Is the promise in this case within either of these classes of cases? The promise was to pay the debt and costs, if the plaintiff would cease to prosecute the action then pending, and would stay all further proceedings therein. This promise of the defendant did not constitute a purchase of the debt; nor was it an extinguishment of it. It was not a transfer to the defendant of any fund, or security, or property for the payment of the debt; and there was no original or inherent liability in him to pay it. At the most it was an undertaking by the defendant to pay the debt, if the plaintiff would forbear and cease to prosecute a particular remedy which he was then pursuing against the original debtor. This left the debtor liable to the plaintiff in a new action, if he should think proper to bring it, as there was a continued liability in the original debtor to the plaintiff. This promise, therefore, no matter how binding *in foro conscientiae*, is within the meaning of the statute.

The demurrer is sustained.

[Legal Gazette, Oct. 20, 1871, Vol. 3, p. 344.]

Court of Common Pleas, Philadelphia County.

IN DIVORCE.

MURPHY v. MURPHY.

1. Discontinuance of a suit for divorce must always be, by *express* leave of the court.
2. A second libel in divorce being filed, without any entry on the record showing that there was a discontinuance of proceedings on the first libel, the court will not allow the entry of such discontinuance as of a day anterior to the bringing of the second suit.
3. The court must be satisfied that every rule of its own has been strictly followed, and every requirement of the law has been established by proof, before they can decree a divorce.

Opinion by ALLISON, P. J. Delivered October 21st, 1871.

The libellant, John Murphy, commenced proceedings against his wife, Delia Murphy, for a divorce *a vinculo*, on the ground of adultery, alleged to have been committed by the wife. To

this proceeding she appeared by counsel, and between the 24th of January, 1870, when the libel was filed, and the 23d of September following, various rules were taken and orders made, of all of which the libellant had notice, and to which he appeared; these rules and orders had relation to the payment of counsel fee, and alimony *pendente lite* and of attachment to enforce obedience to the orders made against libellant, all of which he resisted step by step.

The record also shows that libellant proceeded, under the rules of court, to issue the cause, and entered a rule on respondent to answer within thirty days, which answer was put in June 6th, 1870. Interrogatories were filed and each party exhibited a list of the names and residences of witnesses, to whom they were to be addressed.

On the 25th of June, 1870, an examiner was appointed to take the testimony in the cause, and here the case seems to have rested until the 6th of July, 1871, when a rule on the libellant was entered for an attachment for non-payment of arrears of alimony.

The records of our court also show that on the 14th of January, 1871, the same libellant filed a second libel against his wife for divorce, on the ground of desertion, which proceeding is entitled as of March term, 1871, No. 39. In this cause there was a rule to answer, answer filed, and an examiner appointed, and on the 8th of July, 1871, a rule was entered on the libellant to show cause why respondent should not be allowed to file a supplemental answer, setting up the pendency of the proceedings first instituted as of March term, 1870, No. 46, in bar of the last suit. This rule and the rule for an attachment have been argued, and are both to be considered. Of the first suit there was no discontinuance, though it is asserted that the counsel of the respondent consented to a discontinuance, and upon the face of this agreement of counsel the second suit was commenced.

We are wholly without proofs to support the alleged agreement. The record does not show an attempt to carry it into effect by any entry that can be construed into an effort even to get the first suit out of the way before commencing the second one. Nor is it pretended that there was any motion or rule upon which to obtain the leave of the court, or that such leave was asked and obtained. It is settled law in Pennsylvania that a discontinuance must be founded on the express or implied leave of the court; *Bank v. McAllister*, 6 W. & S. 149; *Same v. Wagner*, 6 W. & S. 147; and it will not be permitted where it will give the plaintiff an advantage, or tend to oppress a defendant; *Bank v. Fisher*, 1 R. 341. The same principle is held in *Belchier v. Gansell*, 4 Bur. 2502. See also *Pollock v. Hall*, 3

Y 42; *Broom v. Fox*, 2 Y 531. So in *McCullough v. McCullough*, 1 Bin. 214, where suit was brought in Dauphin county, in which defendant resided, and was discontinued without express leave, and another suit commenced for the same cause of action in Philadelphia, the home of the plaintiff, the court refused to sanction the discontinuance because it gave to plaintiff an advantage, and subjected defendant to an inconvenience, which, they said, was contrary to justice and equity. In ordinary cases a plaintiff in Pennsylvania may, without formal leave of the court, on payment of costs, discontinue his action. This is a long established practice with us, and is equivalent to a side bar rule in England for leave to discontinue, which is, of course, before verdict, or argument on demurrer, or execution of inquiry. 2 Arch, Prac. 208. But such entry of discontinuance is always with us, subject to be stricken off upon cause shown. Where the propriety of the discontinuance is contested it must have the sanction of the court.

Upon the assertion that the then counsel of the respondent in this cause agreed to discontinue the first proceeding, we are asked to allow the entry to be made now as of then. To this the respondent objects, because she never, as she swears, consented to such discontinuance. She says that upon applying to her counsel for the alimony, she was informed by him that her husband had "given up" the suit for divorce, and that he would pay her no more money; and that being without support for herself and child, she then applied to the guardians of the poor for relief; this she says was in ignorance of her rights; that she cannot read and was not, therefore, able to protect herself, and that when the second subpoena in divorce was served upon her, she gave it to the solicitor of the guardians of the poor, who said he would attend to it for her. The conclusion of her sworn statement is, that she has always been desirous that the first suit should be tried, confident that she could clear her character from the charge upon which it was based. And that she was ready to meet the issue which the husband had tendered, is shown by the fact that she filed in the cause a list of the names of witnesses, whom she intended to examine to disprove the serious charge of adultery.

Does the case as it thus stands require us to grant the request of the libellant, and allow the entry of discontinuance to be placed upon the record as of a day anterior to the bringing of the second suit? We think that it does not; first, because there is no proof of the agreement of counsel; and, second, if the agreement had been put in writing (if one ever existed), and entered of record, without the consent of the respondent, we would feel ourselves required to strike it off. If this was a suit for the recovery of money, the principle established by the

decided cases would require us to see that no wrong was done to the defendant, or no unfair advantage taken by the plaintiff by a discontinuance entered without formal leave.

But what shall we say of a proceeding which is far more than an ordinary suit at law; which has for its object, not the enforcement of a contract for the recovery of money or of lands, but which asks for the dissolution of the most sacred of all the relations into which parties can enter; which, more than all others, affects the welfare not only of husband and wife, but of the helpless and innocent fruit of the marriage as well. The rule regulating discontinuance of actions at law, applies with tenfold force to a proceeding instituted by husband or wife, to obtain a dissolution of the relation of marriage, because of such proceedings the law does not give to the parties a control by their own agreement; the statute forbidding, as it does, the institution even of such a suit by consent or collusion; and when once commenced, courts step in and assume the regulation of every detail of the proceeding, which is supervised with so much care, that little or nothing is taken by confession or agreement; every essential part of the case is required to be established by proof; the fact of marriage falls under this rule; nor is the ground of divorce, as set up in the libel, taken by confession, but evidence must be produced to prove the sufficiency and the truth of the charges; the court must be satisfied that every rule of its own has been strictly followed, and every requirement of the law has been established by proof before they can decree a divorce.

This is founded on the principle that there are substantially three parties to every such proceeding; society has an interest in every consummated contract of marriage. Upon this institution it is indeed, to a great extent, founded; marriage being a contract having its origin in the law of nature, antecedent to all civil institutions, but adopted by political society, and charged thereby with various civil obligations, upon the fulfillment of which its welfare, if not its actual existence, in a great measure depends. Story, in his *Conflict of Laws*, sects. 109, 111, characterizes it as the most important of all human transactions, and as the basis of the whole fabric of civilized society. Though it is called a contract, it is much more than a contract; the parties who make it cannot by their agreement dissolve or unmake it—it is subject to municipal regulation, over which they have no control, by a declaration of their mere will. It has been well said, that marriage being much more than a mere contract, and depending on the sovereign will, is not embraced in the constitutional interdict of legislative acts impairing the obligation of contracts. The obligation is created by public law, subject to the public will, and not to that of the

parties. 7 Dana, 181. For this reason, the sovereign power in the State may, with or without the consent of both parties abrogate it.

If this is the true light in which to regard the relation of marriage, how apparent is it that every movement, whether it be of advance or retreat, in a suit to dissolve it, should be watched over by the court, so that it may be seen that the general interests of society as well as the most sacred rights of the parties are carefully guarded. The latter reason applies with great power to the case before us. The respondent is charged with the most serious of all charges that can be committed against the marriage relation, and against her character as a woman and a wife, affecting not her only but also her offspring. She has put herself on her oath upon a denial of its truth, and prepares to prove its falsity as she affirms. Shall the husband who has thus put on record this charge be allowed, against her protest, to abandon it without giving to her an opportunity to disprove it? To allow this to be done would be to inflict on her an act of hardship and of injustice as well. We therefore refuse the application for the entry of discontinuance and allow the supplemental answer to be filed in the second suit, making absolute also the rule of July 6th, 1871, for an attachment for non-payment of alimony, the amount of arrears to be determined on the return of the attachment.

Leonard R. Fletcher, Esq., for libellant.

Joseph T Ford, Esq., for respondent.

[Legal Gazette, Oct. 27, 1871, Vol. 2, p. 347.]

Court of Common Pleas, Philadelphia County.

IN EQUITY.

MCFILLIN v. THE BANK et al.

If a defendant chooses to answer a bill in equity, although on demurrer to the bill it would have been dismissed, he must answer fully.

Motion to dissolve injunction.

Opinion by PRIRCE, J. Delivered October 28th, 1871.

This was a bill filed for discovery in aid of a defence to an action of law on a bond in the District Court for the city and county of Philadelphia, to reform the bond, and to restrain the defendants from proceeding in said action. That court has ample power to compel a discovery of facts, material to a just determination of issues in suits at law brought in said court, and

any defence which the defendant in that suit, who is plaintiff in this bill, could make in equity, under the rules and practice of the court, could be made as available for his defence as if it had first been established in a court of equity. That court then has ample jurisdiction both for discovery and defence in the suit brought against the complainant.

And upon demurrer to the bill, or plea, or answer setting forth the jurisdiction of the District Court, this bill would have been dismissed.

But the defendants, instead of setting up this defence to the bill, have filed answers; and it is a well established principle of equity that if a defendant submits to answer, he must answer fully. Story's Equity Pleadings, § 606.

Exceptions have been filed by the plaintiff to the answers of certain of the defendants, and the only remaining question at this stage of the proceeding is, whether these exceptions have been well taken.

In looking into the answers of the bank, we think that the answer to the first interrogatory is insufficient, in not setting forth whether Samuel J. McMullan was *re-elected* cashier of the bank, and if so, when, and how often.

The answer to the second interrogatory is insufficient, in not setting forth the *date* when the bond of the said Samuel J. McMullan was approved, and whose names were *then* affixed thereto as securities.

The answer to the fifth interrogatory is insufficient, in not setting forth with sufficient certainty and particularity *the defaults* with which the said Samuel J. McMullan is charged; and when each item thereof was first known or discovered by any officer or employee, or committee of said bank.

The answer to the sixth interrogatory is insufficient, in not averring that the committees named were the examining committees appointed under section 21, of the by-laws of the bank, and in not showing the dates of their appointment relative to the occurrence of the alleged defaults.

The exceptions to the answers of Samuel Miller and Bayard Robinson are dismissed, and the injunction is continued until the answers of the bank are completed and the further order of the court.

Court of Common Pleas, Philadelphia County.
IN EQUITY.

WINDRIM v. CITY OF PHILADELPHIA.

In answer to a published call of a committee of councils of the city of Philadelphia, the plaintiff, an architect, furnished plans for a building to be used as a house of correction, which plans were approved by councils, and the plaintiff with the consent of the committee, took charge of the building as architect and superintendent, and proceeded with its erection. Sometime afterwards the plaintiff notified councils, that unless his terms of compensation (as proposed by him) were acceded to, he would consider himself "released from all further obligation to the city, and cease performing any further duties as architect of the House of Correction;" whereupon councils elected another architect to proceed with the work. Upon a bill in equity filed praying for an injunction to restrain the new architect from proceeding with the work, and claiming that the plaintiff is entitled to the office, and also claiming compensation for services and the recovery of his "plans," the court held:

1. There being no express agreement or contract between the plaintiff and the proper city authorities, and it being doubtful if a committee of councils, without the authority of councils first expressed in legal form, can make an agreement, which would oblige the city to pay a large sum of money, the injunction cannot be granted.
2. The court entertain grave doubts of the right of the plaintiff to equitable relief in recovering his "plans," and as the right to relief must be clear and certain, and the necessity urgent, upon this doubt the prayer of the bill fails.
3. The House of Correction being a "public work in progress of erection," the act of April 8th, 1846, is conclusive against the power of the court to grant the injunction.
4. As the plaintiff's claim for compensation appears very large, and its reasonableness is doubted, the court would feel bound to refer the question of value of his services to a jury, which affords a further reason for refusing the injunction prayed for.

Richard J. Dobbins and Frank Furness, defendants.

Opinion by ALLISON, P. J. Delivered October 28th, 1871.

The plaintiff claims that he was employed or appointed by the city of Philadelphia to the office of architect of the House of Correction and Employment, which the city is now erecting, under the authority of an act of the Legislature approved April 14th, 1868.

This claim, as plaintiff has stated it in his bill, is founded on the fact that, under a resolution of councils, the committee on House of Correction advertised for plans and specifications for the building which it was proposed to erect, which advertisement contained the following statement: "The first premium for the first and best plan will be \$800; the second premium for the second best plan will be \$400; and the third and last premium for the third best plan will be \$200."

In answer to this published call of the committee, the plaintiff furnished plans, sections, and elevations, designed by himself, for the proposed building, to which were added explanations and descriptions. This plan was, on June 7th, 1870, by resolution of councils approved, and Mr. Windrim was paid the

sum of \$800. It appears by the bill that plaintiff performed services as architect and superintendent, at the request of the committee, or with their knowledge, preparing specifications and superintending the work; that he notified the committee that his terms for drawings and general superintendence would be five per cent. on the cost of the structure.

The committee and the architect seemed to have progressed harmoniously with the work until the 4th of May, 1871, when councils, by resolution, directed the committee to report to them, among other things, whether any architect had charge or supervision of the work, and if so, who and by what authority appointed, and what compensation was to be paid to him. On the 27th of June, following, the committee reported that plaintiff had been in charge of the building as architect and superintendent since its commencement, with the knowledge and assent of the joint committee, but that no compensation had been agreed upon for his services.

Two days thereafter plaintiff sent to councils a communication in which he said that "Unless my terms, as modified, are acceded to (3 per cent.), I shall, after this day, consider myself released from all further obligation to the city, and cease performing any further duties as architect of the House of Correction."

The bill recites in detail the general stages of the controversy which followed, and the election by councils, on the 27th of September, of Frank Furness to the position of architect.

Mr. Windrim claims under the case as laid in his bill that he is entitled to the office to which Mr. Furness has been elected, and prays an injunction against him; and that all the defendants be enjoined against the use of the plans and specifications aforesaid, of which he is the author; and, further, that he may be decreed to be the duly appointed architect of the building; that councils shall be ordered to provide by ordinance for the execution of a contract with him as architect, or, that on failure to do so, they be decreed to pay to him an amount equal to five per cent. on the contract price of the work.

There are several satisfactory reasons for refusing the injunction which is asked by the plaintiff.

His asserted right to be placed in the position to which he makes claim is, when viewed in the most favorable aspect for him, an uncertain and a doubtful right. It is founded on the fact that his plan was adopted by the city, that the building to be constructed is in accordance with it, and that he rendered service as architect and superintendent, with the sanction of the committee, from the 7th of June, 1870, to somewhere about the date of the election of Mr. Furness. The plaintiff admits that

the councils of the city never, with the approval of the mayor, made a contract with him to act as architect; and, that there is not, for this reason, a valid ordinance or joint resolution by virtue of which he can support his claim to the office. We are by no means clear that in the absence of such action by councils and the mayor that a valid contract could be made, such as would be enforced at law or in equity.

The power of a committee to make an agreement, which would oblige the city to pay a large sum of money without the authority of councils first expressed in legal form, may not be taken as a conceded proposition. The extent of the power of a committee must be determined upon mature consideration of the effect and bearing of the various acts of Assembly, incorporating the city of Philadelphia, together with others, which define and limit the power of the municipal body, to expend or authorize an expenditure of the public money. There is the act of 1855, which requires the purpose or "object" of an ordinance appropriating moneys to be stated in the ordinance; the act of 1856 which commands the items to be specified or itemized; the act of February 2d, 1854, which forbids members of councils or committees performing executive duty, and the law which requires councils to first appropriate money before paying a claim against the city.

These, and perhaps other acts, have their bearing upon the point suggested, and are all independent of the abstract question of the power of a committee to make a contract for the payment of money by the city, by virtue of an implied authority, which they may claim to exercise as the agents of the municipality. But in this case there is no express agreement set up; the plaintiff says he notified the committee that his terms for drawings and general superintendence would be five per cent. on the cost of the building. This proposition, the committee in their report to councils, say, in effect, had not been assented to by them; their statement is that no compensation had been agreed upon. We have in this case, therefore, not even an attempt on the part of the committee, to make an express agreement with the plaintiff, and he therefore stands on the implication which flows from the facts as we have stated them. These facts are the notice which plaintiff gave to the committee of his demand, and that for a year or more, with their knowledge and approval, he acted as architect and superintendent. That the plaintiff has a just claim to be compensated for the value of his services to the extent to which he rendered them, will scarcely be denied; but whether it can be enforced as a legal demand, remains to be determined hereafter.

Nor do we feel assured that the other ground upon which the plaintiff rests this part of his case can be successfully main-

tained. He asserts that the acceptance of his plans and drawings by the city, and their use in the construction which the city is carrying on, is a wrong done to him, unless he is employed as architect, and that the plans remain his individual property. The affidavits of a number of the most eminent architects of the city have been presented to support this proposition. They say it is a usage of custom with them that, in the absence of an express stipulation to the contrary, the plans and drawings remain the property of the architect, whether a price is or is not advertised to be paid for them. In other words, that it is for the mere design or invention of the artist that the premium is paid.

This may hereafter be determined to be the law of this case; but if so, it will certainly be a surprise to many. No decision was cited in which this usage had been sustained, and we are not prepared on the hearing of this preliminary motion, to affirm such to be law, supported though the statement is by the affidavits of so many skilled architects. It may be an advantageous rule for them, but it is another question as to how far the public are bound by a custom recognized by the profession, but never yet, we believe, incorporated into the law of the land by legislation or by binding decision. It may be doubted whether, when a price is offered to be paid as a premium for a plan, it would not, in legal, as in common understanding, mean more than a mere privilege of looking at or examining the design.

The sum of \$1,400 which the city paid as a premium for the three best plans would be a large sum to give if, after they had been examined by the committee, the artists had been permitted to take them back as their own property. That such was not the understanding of those who furnished the designs for which premiums were paid, would seem clear from the fact that they were delivered to the city, in whose possession they have since remained, except those portions which were made by the plaintiff, and which he subsequently retained, for the recovery of which the city has directed that necessary agencies should be employed. Upon this part of the plaintiff's case we entertain grave doubts of his right to equitable relief by special injunction, and upon that doubt this prayer of his bill fails. At this stage of the cause, the right must be clear and certain, and the necessity urgent to require a court of equity to grant an interlocutory injunction; such is not this case, and the motion for this reason must be dismissed.

If to this be added the fact which he has stated as a part of his own case, that he abandoned his office, notifying councils that unless his terms were acceded to, he would thereafter cease performing any further duties as architect, we think it

safe to say his case is taken out of the region of doubt, even as to his right to be declared the duly constituted architect of the building.

But if there was any question as to what it is our duty to do with this application for an injunction, we think that the act of the 8th of April, 1846, P. L. 272, is conclusive against the power of the court to grant it. The command is imperative "that no courts within the city and county of Philadelphia shall exercise the powers of a court of chancery in granting or continuing injunctions against the erection and use of any public work of any kind, erected or in progress of erection, under the authority of an act of the Legislature, until the question of title and of damages shall be finally decided by a common law court."

The House of Correction and Employment is a public work in progress of erection, under the authority of an act of the Legislature. We are asked to do by injunction that which would operate indirectly to stop the progress of the erection. This is precisely what Judge Sharswood, in *Philadelphia and Reading Railroad v. The City* (*Legal Intelligencer*, October 6th, 1871), refused to do, declining to follow the lead in this direction of courts of equity in England, and this, we think, is solid ground, on which we can safely stand. The binding force of the act of 1846 was recognized in *Flanigan v. The City* (*Legal Intelligencer*, October 6th, 1871), and by Chief Justice Thompson, in the last application to restrain the Building Commission from proceeding to erect public buildings at the intersection of Broad and Market streets.

If this act of 1846 did not require that plaintiff's claim for damages shall be finally decided by a common law court before he can have an injunction, we are inclined to hold upon the general principle that where a full remedy at law is afforded to a claimant, he has no standing in equity; that the relief which the plaintiff prays for could not in this form be granted. The question of his right to recover against the city could, it seems to us, be settled by a suit at law, and, if so, he has no standing in equity; but without deciding this point definitely against the plaintiff, if he chooses to take risk of further proceeding in this suit, we will grant to him the discovery prayed for, as set forth in the 50th and 51st sections of his bills.

Upon that part of the plaintiff's prayer for relief in which he asks that if the city shall refuse to enter into a contract with him, they shall be ordered and decreed to pay to him five per cent. on the contract price of the building, which is nearly a million of dollars, we desire to say that before making such a decree, we would feel bound to refer the question of the value of his services to a jury. The compensation which plaintiff

asks us to decree to him amounts to nearly \$50,000, which is claiming a rate of remuneration far beyond that which is paid for any other kind of professional services in this country. It would make Mr. Windrim's compensation, including the \$800 already paid to him, nearly \$17,000 a year for the three years allowed for the completion of the work; and when it is remembered that this was not for the whole of his time, but that his duties would occupy probably but a small fraction of it, we think we ought to require more than the testimony of members of the profession, as to the rule which they have adopted for their guidance to require us to adopt it as a standard by which courts are to measure the compensation of an architect. Nor should it be overlooked that plaintiff claims that he has already earned the greater part of the \$50,000 in designing and inventing the plan, preparing specifications, and detail drawings, &c. The reasonableness of this claim we are not prepared to admit, which affords us a further reason for refusing the injunction prayed for.

Samuel C. Perkins, Esq., for plaintiff.

H. M. Phillips, Thomas J. Worrell and, Constant Guillou, Esqs. for defendants.

[Legal Gazette, Nov. 3, 1871, Vol. 2, p. 258.]

Court of Common Pleas, Philadelphia County.

IN EQUITY.

RIDDELL v. HARMONY FIRE COMPANY.

1. The name of the plaintiff was transferred from the list of active members to that of contributing members *without notice* to him, and upon application to have his name restored to the active list it was refused.
2. Though the plaintiff was transferred from one roll of members to another, yet he was still the equal of every other member in his right to all the essential and fundamental privileges of membership.
3. The proposed division of the property of the company is illegal; as long as the corporation continues to exist, the property of the company must be preserved to subserve the general purpose and interests of the body.
4. There can be no dissolution of the corporation except in the mode pointed out in the act of 1856.
5. If the money was contributed to establish a charitable use, it cannot be distributed among the members of the corporation.

Opinion by ALLISON, P. J. Delivered October 28th, 1871.

The plaintiff in this bill avers, that he is a member of the Harmony Fire Company; that the company are disbanding their organization, and intend distributing the proceeds of their remaining real and personal property, among certain members of the company, to the exclusion of the plaintiff, having struck his name from the list of participating members, without notice and without hearing.

The defendants reply to the statement of plaintiff's bill, admitting that they are a duly incorporated company, but deny that they are disbanding their organization. They confess that they have sold their engine, horses, harness and hose carriage, to the city, but assert, that the \$3,600 received for the same, has been appropriated to the payment of indebtedness, incurred in the improvement of their real estate.

The material admission contained in the answer is, that the defendants are about to divide 208 shares of stock of the Fire Association, among the members of the company, entitled thereto, and they intend to exclude plaintiff from all participation in the proposed distribution. This they justify on the ground, that under a by-law of the company, adopted November 1st, 1869, the name of the plaintiff was dropped from the list of active members, and transferred to the contributing roll. It is not averred that this was done, with notice to the plaintiff, but that he was heard before a committee subsequently, upon his own application, to have his name restored to the list from which it had been struck off. It will from this be seen, that the intention to exclude plaintiff from participation in the proposed distribution of the property of the company, is defended upon no other ground, than the transfer by the defendants of the name of the plaintiff to the list of contributing members.

The by-laws of the corporation made in pursuance of a general power contained in the sixth article of their constitution, established four orders of membership in the company: Active, contributing, life and honorary members; each order or division have their duties as well as their rights and privileges defined by by-laws and these having been established, under and deriving their authority from the constitution, are to be read as though they had been incorporated into the fundamental, or ground law of the company. Whatever rights therefore any member of the company may possess under these regulations, or by-laws, are to be treated as constitutional rights, in the enjoyment of which they are to be protected by the laws of the land, and of which they cannot be deprived, by an arbitrary exercise of power by the majority of the members of the company. It is this constitutional right which the plaintiff invokes when he asks the interposition of this court by injunction. His case falls under the head of equity, jurisdiction, to restrain "acts contrary to law, and prejudicial * * * to the rights of individuals."

The defendants admit that the plaintiff is still a member of the corporation. They have not attempted to disfranchise him by expulsion, and the case as it stands upon the bill and answer, is more like an attempted *amotion* of an officer of a corporate body, than the disfranchisement of a member. But if an officer

be removed from his office for good cause, he may still continue to be a member of the corporation. Misconduct warrants only an amotion from that particular office in which the person has misconducted himself, and such amotion does not carry with it an exclusion from the freedom or the incidental rights of membership. So in the case made by the defendants in justification of the removal or amotion of the plaintiff from the list of active members, cause is assigned, which if true in fact, might justify their action, provided it was done upon notice to the plaintiff. But it does not follow from this, that the plaintiff is not still a member of the corporation entitled to the general and common privileges of the body, standing in the corporation, the equal of every other member in his right to all the essential and fundamental privileges of membership. If, as in the case before us, by a law of the body, which violates none of the essential rights of a corporator, he is put up or down on the honorary scale of membership, he remains a member notwithstanding, though he may be entitled to certain privileges which others are not entitled to, or subject to disabilities from which others are exempt. A by-law or regulation which does not transcend the limit of establishing rules for the good order and proper control of corporate interests and corporate members, is a legitimate and valid by-law; but one which would strip a member of his franchises, expel him from the body without sufficient cause, or in disregard of his right to be heard in his defence, would be set aside as a void regulation, and all proceedings under it would fall for want of a proper authority to justify them.

In the answer, the defendants have not pleaded the existence of any by-law or ordinance, under which it is even claimed, that by an exercise of express or implied power derived therefrom, the plaintiff has lost any privileges to which the most favored class are entitled, except those which follow by a transfer from the active to the contributing list—the e privileges are all of them non-essential in their character, which makes the plaintiff's rights to the relief prayed for clear, beyond question.

But if such a by-law had been enacted, we have already stated the well established principle of corporate law, which holds such a regulation to be null and void. *Wilcox on Municipal Corporations*, 271, 272; *Commonwealth v. St. Patrick's Society*, 2 Binney, 441. But, in all cases, even those in which the power of amotion or of expulsion is exercised for sufficient cause, and the authority is clear under the constitution or valid by-laws of the body, it can never be lawfully done unless the party be duly notified to appear, and an opportunity to make defence be afforded to him. *Wilcox*, 264; *Fuller v. Plainfield Academy*, 6 Con. 532; 1 Burr, 540; 2 Burr, 731. And if a party be ex-

pelled or amoved without previous notice or hearing, a mandamus to restore him will be granted. *Delacy v. Navigation Co.*, 1 Hawkins R. 274; *Commonwealth v. Penna. Society*, 2 S. & R. 141. In the 9th section of the answer, defendants say, that plaintiff's name was dropped from the active and placed on the contributing roll, for not attending two-thirds of night fires, during the quarter ending December, 1870, under the authority of a by-law adopted November 1st, 1869; and to this they add, "of this plaintiff had full notice." Notice of what? Not that he was to be tried on the charge of delinquency, but notice of his transfer from one roll to the other, after it had been done. Under the authorities cited, plaintiff's right to a mandamus to compel a restoration of his name to the list from which it had been stricken, is well established, nor is it affected by the fact, that after the wrong had been done, he made applications to defendants to correct it, and that after hearing upon this application, his request was refused. But the injunction ought to stand on another ground. The defendants confess in section four of their answer, that they propose to divide 208 shares of stock of the Fire Association among the members of the company entitled thereto. This proposed division of the property of the corporation among the members, is clearly illegal. As long as the corporation continues to exist, the property of the company must be preserved to subserve the general purpose and interests of the body. They are bound to preserve and use it to advance this end, and have therefore no right to divert its estate or funds, from their legitimate corporate use to that of the personal advantage and profit of the members. The act of April 9th, 1856, P. L. 293, provides a mode by which powers contained in a charter may be surrendered or the corporation dissolved. A petition must be presented to the Court of Common Pleas, which, if satisfied that the prayer may be granted, without prejudice to the public welfare, or the interests of corporators, may enter a decree accordingly, whereupon such powers shall cease, or such corporation be dissolved. It is further provided, that the accounts of the managers, directors, or trustees, shall be settled in the court and by them be approved, and the effects of the corporation divided among corporators entitled thereto, as in the case of accounts of assignees and trustees. The act contains the further provision, that property devoted to literary, religious, or charitable uses, shall not be diverted from the purposes for which they were granted. This act operates as a bar against the division of the property of the defendants, in the manner admitted in their answer, if it is proposed to make the distribution in anticipation of a dissolution of the company, and if the company do not intend to dissolve, then they have no right to divide it among the individual corporators.

It is of importance that the hose and fire engine companies which belonged to the former volunteer organization of the city, should pay special heed to the act of 1856. Not the least important feature of the act for their consideration is that which forbids a diversion of property devoted to certain uses as above enumerated, and as a large portion of the money or property which they have under their control, was contributed by the public, either by individual or corporate subscription to provide and maintain a fire department for the protection of property against fire, a question may be raised, as to whether this does not constitute a charitable use, which protects the fund against a diversion from such use.

But we hold that in any event, property can only be divided under an application to the Common Pleas, to be allowed to surrender corporate powers, or to dissolve the corporation, and therefore the attempted distribution by the defendants is illegal.

Injunction continued.

Aaron Thompson, Esq., for plaintiff.

William B. Hanna, Esq., for defendant.

[Legal Gazette, Nov. 10, 1871, Vol. 2, p. 266.]

Court of Quarter Sessions, Philadelphia County.

EDWARD MAKINSON'S ESTATE.

1. Certain lands of a decedent having been taken by the city of Philadelphia, and a jury having assessed damages subject to the payment of liens, the auditor was right in distributing the fund to the lien creditors as well as to the administrator, even though the title to the land vested in the city during the lifetime of decedent.
2. Undoubtedly interest may be recovered upon arrearages of rent, but there are cases in which it may be justly refused, and this is one of them, the award appearing equitable and just.
3. The auditor properly charged the fund with the expenses of the audit.

Opinion by LUDLOW, J. Delivered November 4th, 1871.

We do not feel disposed to interfere with the report of the auditor in this case, and we assign the following reasons for our decision :

1st. Under and by virtue of the acts of Assembly in such cases made and provided, a jury assessed the damages due to the owner of certain land situated within the limits of the Fairmount Park ; in their report the jury award damages due the late owner, Edward Makinson, subject to the exhibition of a good title, and deductions for certain incumbrances ; this report was never excepted to, and was absolutely confirmed.

The administrator now contends that he is entitled to the

whole fund without any deductions whatever, because the title to the land vested in the city during the lifetime of Makinson, and the damages could only be recovered by his personal representative.

Assume for the purpose of the argument, that the position taken by the exceptants is sound in a technical point of view, why should this court now order the entire fund to be paid to the administrator, when, under the opinion in *City v. Dyer*, 5 Wr. 470, "if there are liens upon the land, the rights of the lien creditors may be protected, by ordering the fund to be paid into court to be marshalled then." The auditor has not attempted to distribute the fund except to the lien creditors and the administrator of Edward Makinson.

The jury assessed damages subject to the payment of liens, and whatever criticism may be made upon the form of the report, we know that we are now doing precisely what we would have done had a petition for the protection of the lien creditors been presented to the court.

The question then is not shall we in this proceeding criticize the form of the distribution of the fund contained in the report, but how shall it in fact be distributed; and this disposes of all the law and the learned arguments of counsel intended to convince us that the report of the jury was in part void, and the decree of our court a nullity.

2d. Has the auditor properly distributed the fund?

The administrator of Edward Makinson contends that too much has been distributed to the ground rent owner, while the ground landlord claims that he has received too little.

The question is not free from difficulty, for it is impossible to ascertain from the report of the jury the exact basis of their computation of damages. Undoubtedly for some purposes the title to the land vested in the city, but for other purposes that title did not, it would seem, so immediately vest, as to oust the ground rent owner of his rights.

The question is one which must be determined (like the question of interest upon accrued rent) by the equities of the case.

The city did not take possession of this land until the 23d day of June, 1871, the auditor has calculated interest to October 23d, 1871, and inasmuch as no exception was filed to the report of the jury, and we are therefore without the data upon which the jury have based their report, we incline to the opinion that the jury did that which was equitable and just, and must therefore have included as part of the damages the very item now under consideration. The report of the auditor on this point seems to be on the whole just, and therefore we decline to reverse his decision.

Acting upon equitable principles the auditor refused to allow interest on arrears of ground rent to time of payment, and to apportion the rent accruing since July 1st, 1871. Undoubtedly interest may be recovered upon arrearages of rent, but there are cases in which it may be justly refused. This we think is one of them, for although non-payment may be evidence of laches, so also may the neglect to demand and sue for the arrearages be considered. In *Gaskins v. Gaskins*, 17 S. & R. 390, interest was refused upon a claim analogous to this one.

In *McQuesney v. Hiester*, 9 Casey, 435, whether interest be recoverable on arrears of ground rent is a question depending on the equity of the particular case, and this is also the rule, when by a neglect to demand the rent, the landlord has given reason to believe that he does not want it.

Surely a tenant is put to inconvenience enough, and a possible loss by the act of the Legislature in taking away his property; and when we sanction a distribution which gives to the landlord compensation for his estate in the rent after the commonwealth has technically taken away his title by an act of Assembly, we go as far as we ought.

These remarks will also apply to a demand for an apportionment of the rent itself.

The auditor properly charged the fund with the expenses of the audit, and on a consideration of the whole case, we have concluded to dismiss exceptions one, two, three and five, filed by Samuel Hart, administrator *d. b. n.* of E. Makinson, deceased, and also exceptions one, two and three filed by W. F. Miskey, trustee.

We confirm the report of the auditor.

Charles Henry Hart and *Thomas E. McElroy, Esqs.*, for administrator *d. b. n.*

J. Cooke Longstreth and *H. C. Townsend, Esqs.*, for landlord.

[Legal Gazette, Nov. 10, 1871, Vol. 3, p. 367.]

Orphans' Court, Philadelphia County.

ESTATE of ISAAC B. PARKER, dec'd.

PETITION.

To the honorable the judges of the said court.

The petition of *Mrs. Marcia R. Freeman* respectfully represents:

1. That the above named decedent died on the 19th day of September, A. D. 1865, leaving a will, which was duly admitted to probate by the surrogate of the county of Burling-

ton and State of New Jersey, on the 5th day of October, A. D. 1865, and on the same day letters testamentary were issued thereon to John B. Parker and Frederick Watts, the executors named therein.

2. That on the 30th day of November, A. D. 1865, the said will was proved in the office of the register of wills in and for the city and county of Philadelphia, and letters testamentary issued thereon to the same persons as executors.

3. That the said executors both reside in the State of Pennsylvania, one of whom to wit: Frederick Watts, resides in the borough of Carlisle, and the other, to wit: John B. Parker (who is acting executor), in the city of Philadelphia, where your petitioner also is domiciled.

4. That your petitioner is a citizen of the State of Pennsylvania.

5. That the said executors still have in their custody and control, undistributed assets of the said estate, amounting to the sum of one million five hundred thousand dollars, or thereabouts, as your petitioner is informed and believes.

6. That there are no debts of the decedent still unpaid in any place, as your petitioner is informed and believes.

7. That under the will aforesaid, your petitioner is entitled to a general legacy of fifty thousand dollars, and to such a further equal seventh share in the entire residue of the said estate, real and personal, as is especially set out in the fourteenth section of the said will.

8. That your petitioner has not received any portion of the said legacies or devises.

9. That an act of Assembly of the commonwealth of Pennsylvania, was approved on the tenth day of June, A. D. 1871, which is entitled and reads as follows, to wit:

"An act supplementary to an act relating to the jurisdiction and powers of courts, approved the 16th day of June, A. D. 1836.

"Section 1. Be it enacted by the Senate and House of Representatives of the commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same, That it is hereby declared to have been the true intent and meaning of the several acts and parts of acts of Assembly of this commonwealth, conferring jurisdiction upon the different Orphans' Courts, that the powers and jurisdiction of said courts shall extend to and embrace all cases in which any citizen or citizens of this commonwealth shall demand an account and payment of their claims as creditors, devisees, legatees or other *cestui que trust* of any executor, administrator or guardian, who may have been or may hereafter be served within this commonwealth, with citation or other process requiring an ac-

count, distribution or payment of assets without regard to the domicile of the decedent, or the place in which said assets have been or may hereafter be received, and the said Orphans' Court are hereby empowered and directed to give relief to all citizens, claimants against all executors, administrators and guardians, found or to be found within this State, although the fund or assets of said estate, may have been or may be collected or received, or subject to the defendant's control outside of this State."

"Sect. 2. That all acts or parts of acts, inconsistent herewith, be and the same are hereby repealed."

Your petitioner therefore prays your honorable court, that a citation may be issued to the said executors, returnable on the 24th day of June, A. D. 1871, directing them and each of them to show cause why a decree should not be made by your honors ordering them, the said executors, to make and furnish to your honors a just and true account of the assets of the said estate, which have or ought to have come into their hands or control, and to make a distribution and payment to your petitioner on the giving of such security as is required by the act of Assembly in such cases made and provided, of such amount and share of the assets of the said estate as shall be found to belong to her under the said will. And your petitioner, also, prays that, if to your honorable court it shall seem fit, your honors will appoint some suitable person as auditor or master, to ascertain the amount which may be due to your petitioner as aforesaid, and before whom the said account may be stated.

MARCIA R. FREEMAN.

ANSWER OF JOHN BROWN PARKER, ACTING EXECUTOR.

To the honorable the judges of the Orphans' Court of Philadelphia county.

It is true, that upon the dates mentioned in the petition for the citation, letters testamentary were issued to the executors named in the will of Isaac Brown Parker, by the surrogate of Burlington county, New Jersey (which was, and for many years prior to the testator's death had been, the place of his domicile), and that subsequently letters testamentary ancillary to those issued in New Jersey, were issued to the said executors, by the register of wills of Philadelphia.

It is also true, that Frederick Watts resides in Carlisle, and that the respondent, who is (and since the grant of letters testamentary has been) the acting executor, resides for the greater part of the year in Philadelphia, and during the summer and part of the fall months, in Burlington county, New Jersey;

and that Mrs. Freeman, the petitioner, is resident in Pennsylvania.

The acting executor has, subject to his control, assets of the estate collected in New Jersey, Pennsylvania, New York, Maryland and Delaware; very much the larger part of which are those collected under the letters testamentary granted in New Jersey. The assets collected by virtue of the letters testamentary granted in Pennsylvania, have been made the subject of a first and second account filed in the office of the register of wills in Philadelphia, and which accounts include all of the assets under the letters last mentioned, collected up to the time of filing said accounts.

It is true that there are no debts of the decedent remaining unpaid; and that the petitioner is, under the will, entitled to a pecuniary legacy, and to an interest in the residuary estate. The income of which legacy, and of the said interest in the residue, has been (as nearly as the same could be calculated, and when received) regularly paid by the respondent to the petitioner, from the time of decedent's death to the present.

It is true, as alleged in the petition, that no portion of the said legacy or of the said residuary estate has been transferred to the petitioner; the sole reason of which is, that the petitioner, by virtue of the auditor's report, operating upon the Pennsylvania assets, and which was confirmed 19th December, 1868, by this court, whose decree was affirmed by the Supreme Court, 11th May, 1869, [*Parker's Appeal*, 11 P. F. Smith, 484—Ed.] is required before a transfer of assets is made to her, to enter security to protect the interests of those in remainder, under the provisions of the act of 24th February, 1834, and this she has not done, although she has been more than once invited on behalf of the respondent to do so.

In April, 1870, Mrs. Freeman filed a petition in this court, claiming that she was entitled to distribution here of the assets of the entire estate (as well those in New Jersey, New York, Maryland and Delaware, as those in Pennsylvania), and procured a citation to issue, requiring the executor to show cause why the portion of all the assets claimed to be due, should not be ascertained and a decree for its payment made. To this citation, answers were filed and upon 22d October, 1870, President Judge Allison delivered the opinion of the court, refusing the requirements of the citation, and dismissing the petition, and a decree to this effect was made on the same day: from this decree, Mrs. Freeman appealed to the Supreme Court, and the appeal was dismissed. Mr. Justice Read on the 18th May, 1871, delivering the opinion of the court. [Reported in *Legal Gazette*, vol. iii., p. 174—Ed.]

It is alleged in the petition now presented, that on the 10th

June, 1871, a supplement to the act of Assembly of 16th June, 1836, was approved, which supplement is set out in the petition. And although the respondent has not been able otherwise than by the said allegation, to know whether or not such enactment exists (the laws passed by the Legislature lately adjourned, not having been either reported or published), yet he believes that it does.

The petition now before the court was filed two days after the approval of the said supplement, which purports to give an interpretation to certain acts of Assembly, differing from that put upon them by this court and by the Supreme Court, and an interpretation in accordance with the contention of Mrs. Freeman in the litigation aforesaid, began in April, 1870. From which the respondent is led to believe and so charges, that the passage of the act was procured by Mrs. Freeman without having caused either the Legislature or the governor to be informed of the adjudication of this court, and of the Supreme Court before referred to.

To the mandate of the citation under the act of 10th June, 1871, the respondent shows the following cause:

1. That this honorable court in a decree affirmed by the Supreme Court, which decree is final and conclusive, and was made prior to the passage of said last mentioned act of Assembly, has declared it to be the law of the land, that this court has no jurisdiction over the property of Mr. Parker outside of the commonwealth of Pennsylvania, and that it therefore could not entertain a petition for an account of assets so collected. The act of 10th June, 1871, does not in terms declare the law to be otherwise, neither does it give to those mentioned in it a right to demand an account of such assets so found outside of the commonwealth of Pennsylvania.

2. That the act so far as it is intended to affect the rights of the petitioner and of the executors, and to give an interpretation to acts of Assembly differing from that given in the litigation referred to, wrongfully trenches upon the judicial power of this court and of the Supreme Court, which the Legislature cannot lawfully do; and the said act is so far both unconstitutional and void.

The respondent further says, that the legatees and distributees of the estate reside in New Jersey, New York, and Pennsylvania, that touching the executors' administration of the entire estate of the decedent and of the assets beyond the State of Pennsylvania, they are subject to the jurisdiction of the courts of the State of New Jersey, and that the court of Burlington county has assumed and exercised this jurisdiction. That on the 4th of December, 1867, the executors filed in the office of the surrogate of Burlington county, New Jersey, an

account (a copy of which, with a copy of the second account, hereinafter mentioned, the respondent asks to be taken—when produced—as part of this answer), of all the assets of the estate, as they were in law bound to do; whereupon the following decree was entered by the Orphans' Court of Burlington county: "The surrogate having audited and stated the within account, and placed the same on the files of his office, and a notice of the settlement thereof having been published according to law, and the same being now reported for allowance and settlement, and no objection being made thereto, it is ordered and decreed that the said account be allowed in all things as reported."

The second account of all the further assets then belonging to the estate, was afterwards filed by the executors in the office of the surrogate aforesaid, and at the December term, 1869, of the Orphans' Court, of Burlington county, a decree of allowance, similar to that before mentioned was made with reference to the said second account. Both of which decrees remain in full force and effect, unexcepted to, unappealed from, and unreversed.

The respondent is advised by counsel learned in the law of New Jersey, that in order to obtain a decree of distribution in that State where there is a will, it is in the power of any one interested, after a decree of allowance, to apply by bill to a court of equity having jurisdiction; and that it is now in the power of Mrs. Freeman to take this course.

In the answer to the former citation, issued at the instance of Mrs. Freeman, the respondent offered to do what was in his power to facilitate such application. On his behalf, similar offers have since been made, and he is still willing, and offers to do what he can to speed the proceedings in the said court of equity—proceedings which he has been informed by counsel in New Jersey could be terminated by decree within six months from the time of their commencement.

The respondent has been advised and believes that it is only in the courts of New Jersey, which have always had and still have jurisdiction of the administration of the entire estate, that the executors can obtain their final discharge from their office of executor—a discharge which they can obtain in no other way than by distributing the estate in compliance with a decree of a court of equity having jurisdiction as aforesaid. The respondent, as well as his co-executor, has been most anxious that such decree should be obtained as speedily as possible; the more so, because the compensation of the executors as fixed by the will is wholly inadequate to a protracted and tedious settlement of the estate, the sum bequeathed to both the executors as compensation being about one-half of what a commission on the estate

of one per centum would be; and also because the action of several of the legatees has rendered the duties of the executors laborious and hazardous by a neglect to support their efforts rightfully, to distribute the assets, and by expensive litigation.

JOHN BROWN PARKER.

ANSWER OF FREDERICK WATTS, EXECUTOR.

To the honorable the judges of the Orphans' Court of Philadelphia county.

I have read with care the answer of John Brown Parker to the above citation. As is stated he has been and is the acting executor, and the allegations responsive to the citation and the petition on which it is based, are more accurately within his than they are within my knowledge. Of the greater part of what is set forth in his answer, I have some knowledge, and I believe this as well as the rest of the statements to be perfectly true and correct.

For the very forcible and important reasons which Mr. Parker has given in his answer, and to save the executors from the confusion and possible loss that might attend the accounting by them in two separate and independent jurisdictions, and also because the jurisdiction of the courts of New Jersey has, before those of Pennsylvania and long since, attached, it is respectfully submitted, that the decree prayed for should be refused.

FREDK. WATTS.

Opinion by LUDLOW, J. Delivered November 11th, 1871.

1. No one doubts the right of any commonwealth to hold home assets for home distribution, and an ancillary administration for that purpose may by law be established.
2. The construction of an act of Assembly, which makes it appear that the act undertakes to legislate not only upon the distribution of the assets of a decedent in Pennsylvania, but also of funds or assets simply collected or received "outside of the State," prior to final decree of a foreign court, or agreement to permit distribution by a resident executor, and which are in no sense Pennsylvania assets, cannot be maintained.
3. Personal estate of a decedent is to be regarded for the purpose of succession and distribution wherever situated, as having no other locality except that of his domicile; ancillary letters are taken out to enable a foreign executor to collect funds or property, not collectible within the jurisdiction of the domicile.
4. Under an ancillary administration the residuum after the payment of domestic creditors, is to be transmitted to the Probate Court of the county of the domicile.

The act of Assembly under which this petition has been filed, presents another illustration of the danger of special legislation; unless we declare the law unconstitutional, or lay a restraining hand upon it by giving to it a restricted interpreta-

tion, we are in danger of introducing the most inextricable confusion into an otherwise perfect system.

No one doubts the right of any commonwealth to hold home assets for home distribution; an ancillary administration for that purpose may by law be established; its necessity and practical adaptation to the wants of persons interested are obvious, but the moment an attempt is made to go beyond this well defined limit, the vice of the law becomes apparent. It is of a much more serious nature than at first sight may appear; close examination and reflection, however, establishes the proposition stated beyond doubt. The Legislature have by this law (if we agree with the learned counsel for the petitioner in the broad view of the language of the statute which he maintains) undertaken to legislate not only upon the distribution of the assets of a decedent in Pennsylvania, but also of funds or assets simply collected or received "outside of the State," by a resident executor, and which are in no sense Pennsylvania assets, and that too without or before a final decree of distribution by the tribunal having jurisdiction in the Territory or State of decedent's domicile.

That this construction ought not if possible to be maintained is clear, because it destroys a well settled rule applicable to such cases, violates the comity which ought to exist between States or nations, and because the act may receive an interpretation which, while it does not touch the power of the Legislature, preserves intact the principles upon which that power ought alone to be exercised.

The late Judge Denio, in *Parsons v. Lyman*, 20 N. Y. Rep. 103, but stated the principle already established by numerous other adjudged cases, when he said, "The true rule is that the executor is liable to account in each jurisdiction where he received his authority for the assets collected by virtue of that authority."

The interpretation of our act now contended for, makes this legislation extra-territorial. The law becomes a sort of legislative edict to other commonwealths, States or nations, that hereafter in Pennsylvania, it is our intention to distribute the assets of every man's estate, no matter where he may be domiciled, in Pennsylvania courts. What then it may be asked is to become of the executor? Suppose a foreign state refuses to recognize any such legislation. Should an executor distribute here he may be held accountable there, and thus between conflicting jurisdiction the executor is ground to powder. In full view of such consequences, there has heretofore existed a comity between different States and nations. The books afford many illustrations. The principle was distinctly recognized by the Supreme Court of the United States in *Wil-*

kins v. Ellet, reported in Legal Gazette, of Philadelphia, September 9th, 1870. Nelson, J., delivering the opinion of the court, says: "It has long been settled, and is a principle of universal jurisprudence in all civilized nations, that the personal estate of the deceased is to be regarded for the purpose of succession and distribution wherever situated, as having no other locality except that of his domicile." The learned judge then points out the true purpose of an ancillary administration, and then says:—"And generally the ancillary letters are simply made subservient to the claims of the domestic creditors, the residuum being transmitted to the Probate Court of the country of the domicile for the final settlement of the estate."

What residuum is thus referred to—the general balance wherever collected in the hands of the executor?

By no means, for the only purpose of the ancillary administration is to enable a foreign executor to collect funds or debts, or property not collectable within the jurisdiction of the domicile, "for," says Nelson, J., in the same opinion, "if a portion of the estate is situated in another country, he cannot recover possession by suit without taking letters of administration from the proper tribunal of that country."

The residuum therefore spoken of is that balance of the assets of an estate collected under ancillary letters, and which remains after payment of domestic creditors, and *that balance alone*. Even this residuum is to be transmitted to the Probate Court of the country of the domicile.

A wise administration of the law has heretofore rendered it possible to settle an estate, no matter though it may have consisted of assets situated everywhere.

A general comity renders it possible to protect domestic creditors by a distribution among them of, so to speak, domestic assets. No one has been sent to a foreign jurisdiction to be paid out of a fund collected at home; and so, on the other hand, the settlement of an estate has not been embarrassed by an attempt to drag foreign assets into an ancillary administration.

From all that has been said, while it is not our intention to destroy the constitutionality of this act—though much may be said upon this point—yet it is our desire to give to the law an equitable construction. This we think can be done.

The Legislature could not have intended that which would amount to an impossibility; the case might arise in which, by a final decree of the court of the domicile, the assets of an estate might be within the power, custody, or control of a resident executor, or a court of foreign jurisdiction might permit a distribution to be made here; in all such cases relief

ought to be given by our own tribunals. Then, very properly, a "citation or other process, without regard to the domicile of the decedent, or the place in which assets have been or may hereafter be received," might issue, and thus our Orphans' Court would give a relief, not inconsistent with principles of right and of international or State comity, without confusion and consequent disorder "to all citizens, against all executors, administrators and guardians found, or to be found within this State, although the fund or assets of said estate may have been or may be collected or received or subject to the defendant's control outside of this State."

The prayer of the petition is refused, and the petition is dismissed.

Opinion by ALLISON, P. J. Delivered November 11th, 1871.

1. The act of Assembly of June 10th, 1871, relative to Pennsylvania executors and administrators accounting for foreign assets, is void, because it conflicts with that part of the constitution which imposes on the judiciary the duty, and gives to it alone, the power of declaring what interpretation shall be placed on the acts of Assembly conferring jurisdiction upon Orphans' Courts.
2. An expository law is held by the Supreme Court to be destitute of retroactive force, because it is an act of judicial power, and it is also in contravention of the 9th section of the 9th article of the constitution.
3. It cannot be safely inferred that the Legislature intended to direct the courts to give relief contrary to that which had been declared by the Supreme Court to be the true interpretation of the laws giving jurisdiction to Orphans' Courts.
4. The act in question cannot be regarded as merely remedial, as it subjects the executor to a risk of being compelled to pay the same money twice, and which risk did not exist before the passage of the act. It alters and impairs the obligation of the contract of the executors, and is therefore unconstitutional and void.

To all that my brother Ludlow has so well expressed, upon the argumentative concessions, that the act of June 10th, 1871, is a valid act of Assembly, I desire to add, that I would go further and hold the act to be void, because it conflicts with that part of the constitution, which imposes on the judiciary the duty, and gives to it alone, the power of declaring what interpretation shall be placed on "the several acts and parts of acts of Assembly of this Commonwealth, conferring jurisdiction upon the different Orphans' Courts."

The law, as it has been more recently settled by the Supreme Court, establishes, I believe, this proposition, and it is not to be denied, that this is, comparatively speaking, new ground upon which the court has planted itself, because it felt compelled, by the encroachments of the Legislature, upon the judicial power of the State, to forget the things that were behind, and advancing boldly into the light, do works meet for repentance, as they characterized it. *Reiser v. The Association*, 3 Wr. 137, is not of uncertain sound, but takes the broad ground, de-

nying to the Legislature the power of directing the judiciary in the interpretation of acts of Assembly previously passed ; or to require it to change an interpretation previously put upon them. An expository law is held to be destitute of retroactive force, because it is an act of judicial power, and it is also in contravention of the ninth section of the ninth article of the constitution of this State. This principle is restated by Sharswood, Justice, in almost the precise language of *Reiser v. The Association*, in *Haley v. The City*, Leg. Intl. of June 9th, 1871, which brings the affirmance of the principle, down almost to the very day of the enactment, under which the petition of Mrs. Freeman is presented.

In *Lamberton v. Hogan*, 2 Barr, 225, the court say, explanatory acts must be construed as operating in future cases alone. In *Greenough v. Greenough*, 1 Jones, 495, an expository law is held to be destitute of retroactive force, not only because it is an act of judicial power, but because it contravenes the declaration of the constitution, that no person shall be deprived of life, liberty or property, except by the judgment of his peers or the law of the land. In *O'Connor v. Warner*, 4 W. & S. 227, Gibson, C. J., uses this language: "A legislative mandate to change the settled interpretation of a statute, and uproot titles depending on past adjudications, would be a direct violation of the constitution, which assigns to each organ of the government its exclusive function, and a limited sphere of action."

The doctrine laid down in *Bradee v. Brownfield*, 2 W. & S. 280, that the Legislature possessed power partly legislative and partly judicial, was in *Greenough v. Greenough* repudiated, and the sounder principle asserted, that the judicial power of the commonwealth is its whole judicial power, and is so distributed, that the Legislature cannot exercise any part of it;—that under the constitution there is no mixed power. The court in *Greenough v. Greenough*, refused to give retrospective effect to the act of 1848, which professed to validate all wills made after the passage of the act of 1838, but which had not been executed in the manner therein directed, which form of execution, the Supreme Court had decided to be invalid. The act of 1848 is characterized by the chief justice, as a mandate to the courts to establish a particular interpretation of a particular statute, which constituted an exercise of judicial power in settling a question of interpretation, and in so far as the act of 1848 proposed to cure anterior defective execution of wills, the court set it aside.

The first part of the act which supports the petition of Mrs. Freeman, is as purely an expository act as can be found on our statute books. A series of acts and parts of acts of Assembly, are bound together as by a withe, and the true intent and mean-

ing declared in the lump and expounded to be that which is set forth in the act. If this is not exposition or interpretation, it would be difficult to imagine a case that could be so regarded. It is exercising judicial power; it is not enacting a new law, but it is declaring what is the true interpretation of laws long before enacted. But it has been argued, that if this portion of the act is expository, the last five lines of the first section constitutes new legislation, and gives to the petitioner a new remedy for an existing right. The answer is two-fold; first, that if this view be the correct one, then it is our duty to give effect to it, in such a way that no wrong is done to the accountant, nor confusion worse confounded introduced into the settlement of estates of decedents. And second, the argument we regard as more specious than it is sound; for if the expository portion of the section be stricken out, then that which remains prescribes no mode of giving relief, and it is of no practical value standing by itself. It cannot be safely inferred, that the Legislature intended to direct the courts to give relief contrary to that which had been declared by the Supreme Court to be the true interpretation of the laws, giving jurisdiction to Orphans' Courts. This portion of the act standing by itself, would bring us back to the ground taken in the opinion of the court delivered by my brother Ludlow; and by this construction, the petitioner takes no present advantage, the time not having arrived in which the court can grant relief under this law.

The application of the cases above cited, and others to which our attention has been called, is denied by the petitioner, because she says, that in each one of them, the decision of the court referred to that which was immediately before the court, and that they fail to control this application, because they were decided to be law only where they impaired the obligation of contracts, or divested vested rights. But that they were not placed on the latter ground is established by repeated decision. Retrospective laws, unless they make acts punishable in a manner in which they were not punishable when committed, or unless they impair the obligation of contracts, are constitutional laws. *Gwin v. Risenberg*, 7 P. F. Smith, 435. *Greenough v. Greenough* therefore can only be placed on the ground, upon which the court place it,—that the act was an exercise of judicial power, and that it conflicted with the constitutional declaration, that no one shall be deprived of life, liberty and property, except by the judgment of his peers and by the law of the land. It was not an *ex post facto* law (6 Cranch, 138), and it impaired no obligation of a contract. This case therefore may be regarded as having been decided upon the more advanced principle on which the court rested their decision, and expresses a determination to resist further

legislative encroachments, on the constitutional rights and duties of the judiciary. See also *Baggs' Appeal*, 7 Wright, 572.

Granting the proposition that the General Assembly may exercise all powers which are properly legislative, and which are not taken away by our own or the Federal Constitution, 9 Harris, 161, and that a new remedy may by legislation be given to enforce an existing right, or to give effect to a moral obligation (*Wister v. Hade*, 2 P. F. S. 480; *Keen's Appeal*, 14 P. F. S. 272), can this act of the 10th of June, 1871, be regarded as merely remedial; as nothing more than the extension of a remedy to existing rights? Such clearly was *Keen's Appeal*, but there the remedy operated on the right which existed when the act of April 17th, 1869, was passed; it did not enlarge or extend the right; it did not add a new obligation to that which had previously existed; nor could the petitioner take any larger sum of money, or receive any property, other than that to which his claim related before he obtained a standing in court, with the power to institute an inquiry, which the act of 1869 conferred upon him, and which it had previously been decided as the law then stood, he could not maintain. But is *Keen's Appeal*, upon all fours with the present case, as the counsel for the petitioner argued that it was? We think the difference is a very wide one; in the act of 1871, the petitioner finds as she believes, a right, which adds a new obligation to pay *other and more money*, than by the solemn decision of the Supreme Court, the respondents could, prior to the passage of that act, be compelled to pay. The executors in assuming to perform the duties of their trust in Pennsylvania, obligated themselves to collect the assets within this jurisdiction, and impliedly contracted with the devisees and legatees of John B. Parker, to pay the same to them. They did not promise or in any way contract to pay to said legatees, moneys which they should receive under the authority of a foreign jurisdiction; their contract is to pay them there, because they must there account, and there only can they receive their discharge. The *locus in quo*, is an important and a material part of the obligation of the executors, and to disregard this is to subject them to the risk of being compelled to pay the same money twice. This risk did not exist when they assumed the duties of the executorship, and to add to it now is not only creating a new obligation in this respect, but it is impairing most materially the terms of their contract with the petitioner. This act of 1871 if carried into effect, as we are requested to do, would multiply this risk five times, the property of the estate being scattered over five States, and therefore subject in its several parts to as many separate jurisdictions.

I regard this act as justly subject to the objection that it alters, and in so doing, impairs the obligation of the contract of the executors, and that inasmuch as it creates a new obligation as to a liability to account for, and pay moneys which did not exist as a legal or moral obligation on the 10th of June, 1871, it cannot be regarded as a mere extension of a remedy, and as falling under the class of cases of which *Keen's Appeal* is an illustration. I have said there was no moral obligation to be enforced here, because the petitioner has a full and legal remedy provided for her elsewhere.

I regard the case of *Reiser v. Saving Fund*, 3 Wr. 137, as sustaining the view which I take of the act in question. The court there held that an act declaring that Building Association premiums should not be deemed usurious, to be unconstitutional and void so far as it was expository, when it would require a defendant to pay other or more money than by the law of the land he could have been compelled to pay, before the passage of the act. In a former decision, the court had declared such contracts to be usurious.

The Supreme Court has in several instances retraced their steps as to the power of the Legislature to grant a new trial; that power is now held to be purely judicial, with the exercise of which, the Legislature cannot interfere. And in the recent case of *Commonwealth v. Johnson*, 6 Wright, 446, the act which proposed to abridge judicial sentences in criminal cases, was set aside, for the reason that it trenches on the constitutional power of the judiciary.

There is much more that might be said in support of the view which I take of this act, and many authorities which I think sustain it, but I content myself with resting the case at this point, believing the act to be unconstitutional and therefore void.

Robert N. Willson and F. Carroll Brewster, Esqs., for petitioner.

E. Hunn Hanson, Daniel Dougherty and George W. Biddle, Esqs., for executors.

Orphans' Court, Philadelphia County.

ESTATE OF THOS. HEDDLESON, Dec'd.

The testator bequeathed an annuity to his nephew, to maintain and educate him at a certain institution, "for the purpose of preparing him for the ministry of the Presbyterian Church." Upon exceptions to the auditor's report allowing the annuity, notwithstanding it was shown that the institution named did not exist, *the court held:*

1. That though the particular intent of the testator to have his nephew educated at the institution named, was frustrated by the want of such an institution, yet the general intent being to educate him for the ministry of the Presbyterian Church, the auditor was right in allowing the annuity, according to the doctrine of *cy pres*.
2. From the reading together of the clauses in the codicil to the will and in the will itself bequeathing the annuity, it seems manifest that the annuity is to be paid from the date of the death of the testator.
3. A bequest of a sum of money to "be divided among my brothers and their male heirs," is an absolute gift to his brothers living at the time of testator's death, the words "and their male heirs" being words of limitation and not words of purchase.

Exception to auditor's report.

Opinion by PIERCE, J. Delivered November 18th, 1871.

From reading the will of Thomas Heddleson, deceased, it seems that the testator intended that his real and personal estate should form a common fund, from which, or the proceeds of which, should be paid the annuities and legacy bequeathed by him.

He commences his will by desiring his executors, "*out of the first money arising from the rents of the estate*, to purchase a lot of ground in the Laurel Hill Cemetery, in which shall be built a vault and a monument shall be erected thereon." He then directs his executors to improve two lots of ground by two dwelling houses. He then says: "*After the building of my said vault and monument*, I direct my said executors to pay" two legacies which he subsequently revokes. He then bequeaths to Thomas Heddleson, son of his late brother William, one hundred and fifty dollars per annum, for the purpose of preparing him for the ministry of the Presbyterian Church. He then directs "*that out of the rents of his said estate certain annuities shall be paid*. And finally directs that *his household goods and personal effects shall be sold immediately after his death, and the money arising therefrom invested for the benefit of his estate*."

All these directions indicate that the real and personal estate were to be a common fund, from the rents and income of which were to be paid the annuities and legacy bequeathed by him. These annuities and legacy are therefore a charge upon the real estate expressly and by implication. *McLanahan v. McLanahan*, 1 Penna. R. 96.

This view is aided by the fact that the testator makes no de-

wise or bequest of the residue of his estate, but seems to have intended his whole estate as the source from which the annuities and legacy were to be paid.

The decedent died intestate as to the remainder of his estate after payment of the annuities and legacy bequeathed by him; and the power which his executor has over the real estate is that which he derives by necessary implication from the will. It follows that the fee of the real estate subject to the charges in favor of the annuitants and legatee, and subject to the power of the executor over it for the payment thereof, vested in the heirs of the decedent. It follows as a consequence that if there be any surplus of the income of the estate after payment of the annuities and legacy, it belongs to the heirs, and next of kin of the decedent, according to their respective rights, whether as derived from real or personal estate.

One of the principal exceptions to the report of the auditor relates to the annuity given to Thomas Heddleson, nephew of the testator. The bequest is in the following words, viz.: "I bequeath unto Thomas Heddleson, son of my late brother William, the sum of one hundred and fifty dollars (\$150) per annum, to maintain and educate him in the Presbyterian Orphans' Asylum, at Lancaster, Pennsylvania, for the purpose of preparing him for the ministry of the Presbyterian Church, which sum is to be paid until he is prepared to preach the gospel: provided he so qualifies himself for said office by the age of twenty-one years. It is further provided, that in the event of his failing, from an indisposition to prepare himself, my said executors shall have the power to withhold and cease to pay the said sum, or in the event of his death before arriving at the age of twenty-one years, the said annuity shall be paid equally to my brothers and sisters."

By the first codicil of the will this bequest was modified as follows: "I hereby direct, that if my nephew, Thomas Heddleson, shall attend college till he shall be prepared to preach the gospel, he shall receive the sum of one hundred and fifty dollars, for and during his natural life, and after his death said annuity shall cease and revert to the estate."

The auditor reports that Thomas Heddleson is now between fourteen and fifteen years of age; and it appears from the testimony of witnesses before the auditor, that no such institution as the Presbyterian Orphan Asylum ever existed at Lancaster, and that there is none such of that name in the State of Pennsylvania.

Meanwhile, the executor has supported this boy at his own house, and has clothed and educated him with as much fidelity as though he had been formally placed at such a school, and

has faithfully attended to his religious training in the Presbyterian faith.

We think that the auditor has decided right in allowing this annuity to Thomas Heddleson; for though the particular interest to educate him at a Presbyterian Orphan Asylum at Lancaster was frustrated by the want of such an institution, yet the general intent was to educate him for the ministry of the Presbyterian Church, and by the codicil he was to attend college until he shall be prepared to preach the gospel. The auditor properly says: "If this course were not pursued, the intention of the testator would be frustrated against the policy of the law, which aids, not defeats, the clearly expressed wish of a testator moved by generous impulses to advance the cause of good morals and Christian education and work."

Lowrie, C. J., in *City of Philadelphia v. Girard's Heirs*, 9 Wright, 28, says: "The meaning of the doctrine of *cy pres*, as received by us, is that when a definite function or duty is to be performed, and it cannot be done in exact conformity with the scheme of the person or persons who have provided for it, it must be performed with as close approximation to that scheme as is reasonably practicable; and so, of course, it must be enforced. It is the doctrine of approximation, and it is not all confined to the administration of charities, but it is equally applicable to all devises and contracts wherein the future is provided for, and it is an essential element of equity jurisprudence."

We think, however, that the auditor erred in not allowing Thomas Heddleson this annuity from the death of the testator. The purpose of the bequest appears from the body of the will to be to maintain and educate him for the purpose of preparing him for the ministry of the Presbyterian Church, which sum is to be paid until he is prepared to preach the gospel. By a codicil this is enlarged into a bequest for life, if he shall attend college till he shall be prepared to preach the gospel. We think that both of these clauses are to be read together, and then it seems manifest that he is entitled to this annuity from the death of the testator.

It does not appear from the report of the auditor, as he does not seem to have considered and passed on the exceptions filed, whether the accountant paid the yearly balances in his hands as they accrued to the annuitants or not. If not, he is chargeable with interest thereon from the time he should have done so. Or if he felt it to be his duty to retain the income of the estate until he should file his account and pay it, under the order of this court, it was his duty to invest it that it might earn interest.

As the report must go back to the auditor to correct the

distribution by allowing to Thomas Heddleson, the nephew of the testator, the annuity of \$150 from the time of the death of the testator, he will pass upon the tenth exception of Alexander Heddleson, in conformity with the suggestion above made.

The sum of \$654.87 referred to in the first and second exceptions of Alexander Heddleson, was distributed in settlement of the second account of the executor, as will appear by reference to the auditor's report thereon.

The subject of the eleventh exception of Alexander Heddleson is reported by the auditor in his report on the first and second accounts of the executor, who states therein who are the heirs and the next of kin of the testator.

The third exception of James and John Heddleson relates to the bequest of \$300, mentioned in the first item of the first codicil to the will. That item is as follows:

"First. Such portion of my said will as relates to John Burnet I hereby revoke, declaring that it is my desire that he shall not receive the sum of \$300, or any sum whatever, and the said sum of \$300 shall be divided among my brothers and their male heirs."

The auditor in his first report has found upon the authority of *Wilson v. Vanstart*, 2 Ambler, 561, and *Law v. Davis*, Fitzgibbon's Reports, 112, referred to in 1 Vesey, Jr., 145, that this bequest gave an estate for life to the surviving brothers of the testator with remainder to their male heirs. That the true construction is that the word "heirs" is used in the sense of children who may take as such, not to denote succession but to describe legatees.

There is, however, this difference between the cases to which the auditor refers and this case. In the cases to which he refers which were both bequests to a single person and his heirs male, there was a direction that the property bequeathed was to be equally divided among *them*, which of course could only refer to the heirs male and not to the first taker. And as no one is heir to the living it could not be known who would take until after the death of the first taker. The courts therefore properly held that there was an estate for life in the first taker, with the remainder to the heirs male. And in both those cases the direction to divide the estate follows the bequest to the first taker. In this case the direction to divide precedes the bequest. The words are "the said sum of \$300 shall be divided among my brothers and their male heirs." These words naturally import a division among the brothers, and the added words "and their male heirs" are words of limitation and not words of purchase.

Gilbert in his work on Devises, page 32, commenting on what words pass an estate tail or for life says: "And here the rule will hold good that the intention of the deviser will supply .

the want of those words which are necessary in conveyances of common law. And if A. devises land to B. and his heirs male, the law *in favorem voluntatis* supplies these words of his body and make it an estate tail."

It is a well established rule of law that words which would give an estate tail in land when applied to personal property, give an absolute estate in it to the first taker. *Potts' Appeal*, 6 Casey, 170.

We think, therefore, that this bequest was an absolute gift by the testator, of the sum of \$300 to his brothers living at the time of his death.

The third and fourth exceptions of James and John Heddleson are sustained.

The tenth exception of Alexander Heddleson depends, as has already been suggested, upon the disposition made by the accountant of the balances of money in his hands.

All the other exceptions are dismissed.

Hon. B. Markley Boyer, for James and John Heddleson.

Henry McIntyre, Esq., for Alexander Heddleson.

[Legal Gazette, Nov. 24, 1871, Vol. 3, p. 379.]

Court of Quarter Sessions, Philadelphia County.

COMMONWEALTH ex rel. MINTZER v. THE SHERIFF.

1. The placing of a person in an insane asylum by her relations, under the belief by them of the insanity of such person, is not *per se* evidence of a criminal conspiracy. To render such act criminal, it must be shown to have been done with a corrupt motive.
2. The court, seeing no evidence upon which a charge of conspiracy could be sustained against the relators, must discharge them.

Sur habeas Corpus.

Opinion by PAXSON, J. Delivered November 11th, 1871.

I see no reason why I should postpone the decision of this case. If I had any doubt in regard to it I would delay judgment, but I have not. There has been a great deal said in the cause, and considerable testimony offered, which has very little bearing upon the issue. Stripped of all extraneous matter, the case is narrowed to the simple inquiry whether the relators are guilty of a criminal conspiracy. This court cannot regulate all of the domestic affairs of our citizens. It is only when the law is violated that we can interfere.

I do not propose to express any opinion as to the present mental condition of Miss Mintzer, as regards her sanity. It is not necessary to the proper determination of this case. It would seem to be clear, however, that she is a young lady of

good mind, and more than ordinary attainments. It is also in proof that some ten or twelve years ago she was an inmate of this same institution (Kirkbride's) for a period of about seven months, when she was treated for a disordered intellect. It proceeded from the same cause as her present alleged insanity, viz.: aversion or hostility to her family. Dr. Kirkbride says, in regard to her condition at that time, that he had no doubt of her insanity. Indeed, he had never heard it questioned. She was discharged from the institution after about seven months' confinement, as improved, but not fully cured, at the request of her brother, Dr. St. John Mintzer, one of the relators, who proposed to take her to Washington. Dr. Kirkbride was of opinion that her removal from disturbing home associations to fresh scenes might not prove injurious, and she accordingly accompanied her brother. Sometime thereafter she obtained employment as a clerk in a bureau of the treasury department at Washington, at a liberal salary, and performed her duties for some years with great satisfaction to the department and credit to herself. Finally, she resigned, and returned to her mother's house in Philadelphia. Shortly thereafter the old troubles recommenced, and they resulted in her mother and brothers placing her again, for medical treatment, in the asylum. She remained there a few days, when she escaped and went to the house of Mr. Geo. C. Evans, a personal friend. Dr. Kirkbride was examined as to her mental condition during this brief period, and he says he had two or three interviews with her, and that from those interviews alone, disconnected with the statements of her relatives, he was unable to form an opinion as to her sanity.

That Miss Mintzer was placed in the asylum the second time under a belief of her mother and brothers that the state of her mind required medical treatment, the evidence in this case leaves no room for doubt. If the relators were mistaken in their belief, does it render them criminals? I am not prepared so to decide.

The commonwealth must make one of two points before I can remand these relators. It must be shown either that the act which was the subject of the alleged conspiracy was unlawful, or that unlawful means were made use of to effect it.

The act complained of was the placing of a young lady in a lunatic asylum by her mother and brothers under a belief that she required medical treatment for insanity. This is not an unlawful act by the laws of Pennsylvania. If it were, the condition of those who are mentally afflicted would be pitiable indeed.

Did the relators resort to unlawful means? On the contrary, the law was strictly complied with. Two respectable physi-

cians gave their certificates as to their belief of her insanity. Indeed, without a strict compliance with this rule, no patient can be admitted to this institution.

I am not prepared to decide that the placing of a patient in an insane asylum, by his or her relations, under a belief on the part of the latter of the insanity of such person, and the certificate of two reputable physicians of such insanity, is *per se* evidence of a criminal conspiracy. To render such act criminal, it must have been done with a corrupt motive. No such motive has been proved to exist in this case. We are asked to infer that the object was to unlawfully imprison Miss Mintzer. I will not infer that a mother would conspire to imprison her own daughter unlawfully, without evidence. It must be remembered that this institution is not a Bastille, which the strong hand of the law cannot enter, nor a private mad-house, as they existed in England, where a person could be shut out from the world, and where the voice of friendship, or the aid of relatives could not reach them; but a public institution, where all may enter at proper times and for proper purposes. A writ of *habeas corpus* will bring any one confined there before either of the five judges of this court within an hour, when the cause of his or her detention can be inquired into and passed upon judicially.

Nor is there a particle of evidence to show that any attempt was made to obtain the control of any property of Miss Mintzer. The family estate is held by Mrs. Mintzer, the mother, under a deed of trust. The trust, however, amounts to nothing. Mrs. Mintzer has the absolute disposal of the estate during her life, as well as after her death. So far from this being a conspiracy, or an attempt to obtain any of the young lady's property, it is in proof that the mother offered to settle upon her an annuity of about \$500 a year during the lifetime of the mother, provided she would leave the city and reside with other relatives, as to whom she did not seem to have had any disagreements. This offer was declined by Miss Mintzer, unless the mother would make the annuity payable during the life of her [Miss M.], and give security for its payment. The latter proposition was declined by the mother; and it was not until this last negotiation fell through, and because it fell through, that the criminal prosecution was commenced by Miss Mintzer against these relators. I regret that this feature exists in the case. If there is a conspiracy, it may be a question whether we have the proper defendants before the court.

If I had any doubt about this case, I would send it to a jury. But as I see no evidence upon which a charge of conspiracy can be sustained, I must discharge the relators.

Court of Common Pleas, Philadelphia County.

IN EQUITY.

HAMMERSLEY et al. v. TURNPIKE CO.

A mandatory injunction was prayed for against a turnpike company to restrain them from continuing toll houses on the artificial parts of the road and to compel them to remove said toll houses. The injunction was refused, *because*,

1. The toll houses were erected years ago by the company under a power incident to their express chartered rights, and to remove them except by virtue of subsequent legislation, or for some cause not urged at the argument, would violate a clear right guaranteed by, and incident to, the charter of the company.
2. There is an adequate legal remedy for the plaintiffs if the act of Assembly of April 19th, 1850, has any legal force and effect, and assuming that it is valid, it fully and absolutely meets the requirements of the case.
3. That by proceedings under a recent act of Assembly, a jury are at present engaged in assessing damages, for the purchase of the road by the city of Philadelphia, and the court should not destroy the very property which will be an item in the award of damages.

Opinion by LUDLOW, J. Delivered November 18th, 1871.

The plaintiffs in this bill complain that the defendants have, without legal authority, "erected, built, and used, and still keep up and have ready for use," four toll houses, to the great hindrance and obstruction of public travel; "that they have collected and intend in the future to collect their tolls at said toll houses, so placed upon the artificial part of said road." They further complain that the defendants have erected, or caused, or allowed to be put up and erected a large pole for the use of telegraph wires, whereby the public travel on said road is obstructed and interfered with, to the hindrance of public travel, and the injury of wagons, horses, carts, &c.

We are asked to enjoin and restrain the defendants from continuing and keeping the toll houses on the artificial parts of the road, and to command the defendants forthwith to remove all and singular the said toll houses and the said telegraph pole.

It is obvious from this brief recital of the most material parts of this bill that we are asked to grant a mandatory injunction, the effect of which will be to destroy a portion of the property of the company, and also a telegraph pole, which was not erected by the corporation and which appears to belong to the city of Philadelphia.

The right to demand successfully such action as this, depends upon the chartered rights of the corporation, the power of the court to grant a mandatory injunction, and the peculiar necessities of the case. The fact cannot be denied that "The Germantown and Perkiomen Turnpike Company" exists by virtue of a charter granted many years since by the Legislature of this commonwealth; that charter breathed into this corporation its

life, and, subject to the terms and restrictions contained in its organic law, the company took those rights which by the settled law of Pennsylvania were incident thereto.

Upon principle, it can hardly be conceived how a corporation could exist and fulfil the object of its creation, with power "to erect and fix so many gates or turnpikes upon and across the said road as may be necessary," without also having the right to erect toll houses for the protection of the toll gatherers and their families; and hence our Supreme Court long since decided that a turnpike company has a right to erect toll houses at its gates for the accommodation of toll gatherers, within the limits of the road. *Ridge Turnpike Co. v. Staever*, 2 W. & S. 548; and the only question to be decided is, was the toll house built, and has it been and still is used for the purpose above specified? *Ib.*, 6 W. & S. 378.

The fact cannot be denied that the toll houses now complained of were erected years ago, by this corporation, under a power incident to their expressed charter rights; that toll has been gathered at these houses until, because of certain alleged neglect, the gates were thrown open by the company, as they could be compelled to do, until the roadway has been repaired.

The first great legal obstacle to the success of this motion, then, consists in the fact that the toll houses were legally built, have remained standing for years, and to remove them, except by virtue of subsequent legislation, or for some cause not urged at the argument, and not sustained by any evidence in the cause, would be to violate a clear right guaranteed by, and incident to, the charter of the company. If the act of Assembly hereafter referred to does not touch this case, then the chartered rights of the company and the rights incident thereto, settle this controversy. Suppose, however, that the view above stated is correct, can the court, in any event, with the facts now before it, grant a mandatory injunction?

Such an injunction is peculiar, for by it that is accomplished by indirection which cannot directly be done. We are aware that in England the courts have, from time to time, enlarged this jurisdiction, while in this State, at least one of our own judges has denied that jurisdiction, and condemned the practice altogether. Without deciding that the case must fail for want of jurisdiction, can we, upon well settled English authority, grant the prayer of this bill?

We undoubtedly could, provided we act with extreme caution, and find that every legal remedy is inadequate to meet the requirements of justice, and that to restore things to their original condition is the only remedy for what is said to be the existing condition of things. *Kerr on Inj.* p. 231, and authorities cited in notes *h. i.* and *k.*

Upon the principles thus stated, and abundantly sustained by the authorities cited, we clearly distinguish this cause from *City v. Thirteenth and Fifteenth Streets R. R. Co.*, Legal Intelligencer, May 26th, 1871 [*ante*, p. 163—Ed.], wherein my brother Allison, in an able and exhaustive opinion, discussed the general powers of the court in cases of public nuisances; for, in that instance, a mandatory injunction was not prayed for, and it was admitted that a final and not a special injunction, might be granted where the case is free from all reasonable question, or a special order might be made to await a trial at law.

Such a trial would be unnecessary where the occupation of a public street is a nuisance *per se*. In this instance the erection of toll houses is, as we have already established by a direct decision, not a nuisance *per se*, but was an incident to the chartered rights of the company, and while proceedings at law against this company have been instituted and prosecuted for a special purpose to a final conclusion, this has been done by notice of their charter, and the company have, by the same charter a right to repair their road, when they may again exercise their vested right as a corporation.

Is there, then, no adequate legal remedy for these plaintiffs if they have suffered as they complain? Surely there is if the act of Assembly of 19th of April, 1850, Purdon, p. 988, sec. 52, has any legal force and effect.

Just at this point we remark, that we will not stop to inquire as to the constitutionality of that act, because as without it, in our view, the plaintiffs upon the facts now before us would be remediless, we need only inquire as to the legal effect of this law, assuming that it is as regards this company valid.

The act in question declares "that it shall not be lawful for any incorporated turnpike company whose privileges extend through the incorporated districts of the county of Philadelphia to erect, build, or put up any toll houses on the artificial parts of their respective roads; and all toll houses which now occupy the paved, or artificial part of any turnpike road within the county of Philadelphia, shall be declared an obstruction of the public highway, and shall be removed on or before the first Monday of November next, under a penalty of four dollars for every day that said obstructions shall remain thereon thereafter," &c.

Here, then, is a law which, even conceding the strength of the able argument of the plaintiff's counsel, fully and absolutely meets the requirements of this case. It was stated, and not denied at the hearing, that already a suit or suits had been brought to enforce the penalty, and it would not only be beyond precedent, but contrary to all reason, now to inject into this controversy a mandatory injunction, and thus in a

manner prejudice the final determination of this cause. That this last proposition may more clearly appear, we remark, finally, that no present necessity would justify this extraordinary exercise of power, while justice and equity demand, on behalf of the defendants, that its exercise should, upon this motion, be refused.

Upon the evidence before us, it appears that the corporation defendants have been guilty of a neglect of their road. The return of the inquisition and subsequent jury trial prove this.

But the charter of defendants itself prescribes the penalty, and the company are, at the present time suffering its effects. They have, however, the right by charter to repair their road. They may or may not do this. If they neglect to perform their whole duty, then the question now argued may arise, and then it will be settled, and so, also, should the road be placed in order and the defendants again gather toll.

Again we are told that by virtue of a recent act of Assembly, the city of Philadelphia may purchase this road; that a commission or jury are at present engaged in assessing damages. How can we, with any pretence of justice, destroy the very property which will, at least, be an item in the award of damages.

The plaintiffs in this bill complain of special damage, but the evidence discloses the fact that the toll houses have existed for years, and we conclude that the plaintiffs bought or rented their respective properties with full knowledge of the facts. They suffer temporary inconvenience, but it is far better that this inconvenience should exist, than that the court should, by the exercise of a doubtful and almost arbitrary power, do that which is prayed for.

We have said nothing of the existence and condition of the telegraph pole, and for the reason that it is not owned, and was not placed in position by this company; it probably belongs to the city of Philadelphia, and if so, we would make no order affecting the interest of a party not a party defendant in this bill.

As, however, we do not desire either to prejudice the case now before courts of law, or in any way to interfere with any legal rights now existing, we have concluded to refuse this motion, with leave to the plaintiff to proceed at law.

Court of Common Pleas, Philadelphia County.

IN EQUITY.

BRADY v. WEIGHTMAN et al.

A property was sold at sheriff's sale, under proceedings on a summons in covenant on a ground rent deed against the original covenantors, who had conveyed the property to another person, who in turn conveyed it to the complainant, Edward Brady, executor and trustee, which last conveyance took place nearly five years previous to the issuing of the summons. Brady and the minor children of his testator, occupied the property continuously from July, 1866, and received no notice whatever of the proceedings under which it was sold, nor of the sale itself. On an application for a perpetual injunction to restrain the defendants from proceeding to recover possession of said premises under the sheriff's deed, *the court held*:

1. It is much to be regretted that by the law of Pennsylvania, the real estate of a person may be sold without his having been made a party to the suit, or without notice to him of the proceeding against it.
2. The act of 16th June, 1836, directs certain proceedings to take place to obtain possession of property sold by sheriff's sale, and the complainant must make the affidavit and enter the recognizance prescribed by that act, in order to retain possession until his title is determined as against the purchaser so proceeding.
3. In this case the justices cannot proceed to final judgment in favor of the purchaser. If the complainant makes the required affidavit, or if the petition of the purchaser shows that the justices have no jurisdiction; but as the purchaser is entitled to proceed until this shall appear, the special injunction granted must be dissolved.
4. It is to be presumed that the justices and jury will proceed according to the act, and so proceeding they cannot be interfered with by injunction.

SUMMARY OF BILL.

The complainants set forth their complaint, in substance as follows:

First. William Weightman and Louisa, his wife, by their deed, dated the 16th July, 1864, granted and conveyed to John C. Hawkins and Peter Dickinson, a certain lot or piece of ground situate on the northeasterly side of Ridge avenue, in the Twentieth ward of the city of Philadelphia, which deed contains, on the part of the grantee, a covenant to build a brick dwelling within one year, and with a reservation out of the said lot of an annual ground rent of \$248.40.

Second. Said Hawkins and Dickinson did erect, within the time limited, namely,—one year, a three-story brick dwelling, with back buildings.

Third. Hawkins and Dickinson conveyed said lot of ground, and describing a brick messuage as being thereon erected, to Thomas Harrison et al., by deed dated 7th July, 1865, for the consideration of \$1,460, subject to the \$248.40 ground rent aforesaid.

Fourth. Thomas Harrison et al., by deed dated 3d March, 1866, conveyed said lot of ground, with the three-story brick messuage or dwelling house thereon erected, to Edward Brady, executor and trustee named in and appointed by the last will and testament of Mary A. Brady, deceased, for the consider-

ation of \$3,500, subject to the \$248.40 ground rent aforesaid, and the same was duly approved by the Orphans' Court of Philadelphia.

Fifth. On the 21st of February, 1871, said Weightman issued a summons in covenant *sur* ground rent deed, recorded August 20th, 1864, Philadelphia, returnable in District Court on the first Monday of March, 1871, against John C. Hawkins and Peter A. Dickinson. This summons was returned by the sheriff "served as to P. A. Dickinson," and '*nihil habet*' as to J. C. Hawkins," and against whom an alias summons was issued on the 4th of April, 1871, returnable first Monday of May, 1871, which was returned, "served by posting and publication (*nihil habet* as to defendant)." Upon these returns judgments were entered on the 20th of May, 1871, against Peter A. Dickinson, "for want of an affidavit of defence," and against J. C. Hawkins, "for want of an appearance on two returns of *nihil*," and damages assessed at \$264.34.

Plaintiff's attorney, R. J. C. Walker, having on the 10th of April, 1871, filed a statement, claiming two semi-annual instalments of ground rent of \$124.20 each, due the 16th day of July, 1870, and the 16th day of January, A. D. 1871, respectively.

On these judgments a *feri facias* was issued on 10th day of March, 1871, returnable the first Monday of April, A. D. 1871, and was returned, "levied and condemned," the levy being described as upon the lot aforesaid. Upon this *fi. fa. v. ex.* was issued returnable the first Monday of July, 1871, which was returned, "sold to William Ernst (by R. J. C. Walker, attorney,) for the sum of \$1,000."

Sixth. The deed was acknowledged on the 8th of July, 1871, but said deed was not delivered to the said purchaser.

Seventh. On the 12th of July, 1871, Edward Brady, trustee as aforesaid, obtained a rule to show cause why judgment in the above case should not be set aside; the sheriff's deed then in the hands of the prothonotary withheld from record, and *fi. fa.* set aside, alleging as reasons:

1st. That the complainant and said minors have been living on said premises, in said three-story brick dwelling, continuously and consecutively from 1866, July, until now.

2d. That said premises being so occupied, he had no notice or knowledge of the existence of said judgment, writs of execution, sale or acknowledgment, until the evening of the 11th of July, 1871, when a notice to quit possession was served upon the said Brady.

3d. That neither the summons in covenant, nor *alias summons in covenant*, nor notice of inquisition in said case, were ever served upon said Brady, nor upon any member of his

family, nor were copies of any of said writs or sheriff's hand bill of sale served upon or posted upon said premises.

4th. That said Brady had actually paid the *first* six months' ground rent of \$124.20, included in the judgment entered in said case, and had a set off to the other remaining six months' ground rent included in said judgment.

5th. That said Weightman and his attorney, who is his son-in-law also, and said William Ernst, well knew of the ownership and actual occupancy of said premises by the said Brady and said minor children, and that he is testamentary trustee for them.

6th. That said sheriff's deed, although acknowledged, was not then actually delivered, except as is set forth in exhibit "A."

7th. All of which facts and statements your orator avers to be true, and that he is ready to prove the same.

Eighth. On the 10th of September, 1871, said rule was discharged by said District Court, for the reason alleged, that after the *acknowledgment* of a sheriff's deed the court had no power over it.

Ninth. Your orator charges that said William Ernst, is only acting as agent for said Weightman, and was previously well aware of the facts in the case.

Tenth. Your orator further charges and believes he will be able to prove that said Ernst has not paid the sheriff the amount of his bid up to the present time.

Eleventh. The said Ernst having given the notice, threatens to proceed thereunder and to eject the said Brady from said premises.

Wherefore, inasmuch as your orators have no adequate remedy at law, we pray equitable relief as follows:

1st. That the said William Weightman and William Ernst, their agents or assigns, be enjoined and restrained from proceeding under said notice, until he shall have established his right and title to said premises in an action of ejectment, or until the further order of this court.

2d. That they be perpetually enjoined and restrained from proceeding to recover possession of said premises, under any notice given, or to be given, under said sheriff's deed.

3d. Such other and further relief as the merits of the case may justify.

And your orators, &c.

MARIANNE P. BRADY,
MARGARETTA A. BRADY,
Minors.
By E. BRADY,
Testamentary Guardian.

Opinion by PEIRCE, J. Delivered November 25th 1871.

This is a bill brought to restrain the defendants from proceeding to recover the possession of a property belonging to complainants, sold at sheriff's sale.

The proceeding under which the property was sold was a summons in covenant on a ground rent deed in the District Court, for the city and county of Philadelphia, against the original covenantors, the grantors in the ground rent deed from whom the complainants subsequently, and before the judgment on which the property was sold, derived title. One of the original covenantors was served with process, and judgment was entered against him for want of an affidavit of defence. Judgment was entered against the other covenantor for want of an appearance on two returns of *nihil*.

The complainants allege that they had no notice or knowledge of the existence of said judgment, writs of execution, sale, or acknowledgment of the sheriff's deed. That neither the summons in covenant nor alias summons, nor notice of inquisition were ever served upon the complainant, Edward Brady, who is trustee for the minors, complainants, who lived in the property, or upon any member of his family; nor were copies of any of said writs or sheriff's hand bill of sale served upon or posted on said premises.

The complainant further alleges that he had actually paid the first six months' ground rent of \$124.20, included in the judgment on which the property had been sold, and had a set-off to the other six months' ground rent included in said judgment.

It is much to be regretted that by the law of Pennsylvania it is possible that the real estate of a person may be sold without his having been made a party to the suit, or without notice to him of the proceeding against it. It is neither creditable to our humanity, our civilization, nor our legislation that it is so. By reason of it the unwary are entrapped, and the widow or the orphan may have snatched from them the patrimony on which their subsistence depends. Our legislation in this respect needs revision, and the legislator or lawyer who will accomplish this reform, will be a benefactor to his fellow men.

The proceeding to obtain possession which the complainants seek to restrain in this case, is that under the act of 16th June, 1886, which directs that whenever any lands or tenements shall be sold by virtue of any execution as aforesaid, the purchaser of such estate, may, after the acknowledgment of a deed therefor to him by the sheriff, give notice to the defendant as whose property the same shall have been sold, or to the persons in possession of such estate under him, by title derived from him subsequently to the judgment under which the same was sold,

and require him or them to surrender the possession thereof to him, within three months from the date of such notice.

The act then directs a proceeding before two justices or alderman and a jury of twelve men to be summoned by the sheriff, who are to hear the petition of the purchaser and to inquire into the facts therein required to be set forth, and upon the finding thereof to award the possession of such real estate to the petitioner. The three material facts which by the act are required to be found by the justices and jury are:

1. That the petitioner, or those under whom he claims, has or have become the purchaser of such real estate at a sheriff's or coroner's sale as aforesaid.

2. That the person in possession of such real estate was the defendant in the execution under which such real estate was sold, or came into possession thereof under him by title derived from him subsequently to the judgment under which the same was sold.

3. That the person so in possession has had three months' notice of such sale, previous to such application.

The act further provides that if the person in possession of the premises shall make oath or affirmation before the justices:

1. That he has not come into possession, and does not claim to hold the same under the defendant in the execution but in his own right: or

2. That he has come into possession under the title derived to him from the said defendant before the judgment under which the execution and sale took place, and shall become bound in a recognizance with one or more sufficient sureties, in the manner hereinafter provided, the said justices shall forbear to give the judgment aforesaid.

The act then directs the form of the oath to be administered and the condition of the recognizance, which is that the defendant shall appear at the next Court of Common Pleas, or District Court having jurisdiction, and then and there plead to any declaration in ejectment which may be filed against him, and thereupon proceed to trial in due course of practice.

This act, like all other acts, which direct a proceeding out of the course of the common law and are summary in their character, must have a strict interpretation. *Baugh v. The Sheriff*, 7 Philadelphia Reports, 82.

Under the act, the only two cases in which the justices can proceed to judgment, are where the party in possession is the defendant as whose property the same shall have been sold; or that he came into possession thereof by title derived from the defendant subsequently to the judgment under which the same was sold.

In all other cases the jurisdiction of the justices, for the purposes of judgment and possession, ceases the instant it is made to appear, by affidavit in the manner prescribed by the act,

that the party in possession is not the defendant as whose property the same was sold; or that he did not come into possession thereof by title derived from the defendant subsequently to the judgment under which the same was sold. And the only remaining jurisdiction in the justices is to take the recognizance in the manner prescribed by the act, and if such recognizance should be forfeited, then to proceed and give judgment, and cause the real estate to be delivered up to the petitioner in the manner prescribed by the act.

And we do not perceive that the purchaser is in any better condition by reason of his having purchased under a proceeding on a ground rent deed, if the party in possession is not the defendant as whose estate the same was sold; or has not come into possession thereof by title derived from the defendant subsequently to the judgment under which it was sold, he is certainly not within the terms of the act, and not to be within the terms of the act in a summary proceeding of this character, which is out of the course of the common law, is not to be within the act itself.

It is not necessary to inquire now of what defences the person in possession might avail himself in an action of ejectment, which he would not be permitted to show in the summary proceeding under this act. Even a defendant in possession at the time of levy and sale has been permitted to show as against the purchaser at a sheriff's sale, in an action of ejectment, that the process was void. *Snively v. Wagner*, 3 Barr, 275. See also *Young v. Algeo*, 3 Watts, 223.

And in *Delaney v. Gault*, 6 Casey, 63, it was held that a purchaser at sheriff's sale under a judgment obtained in a *scire facias* on such claim, is not bound to show that the acts of Assembly have been strictly complied with. He is protected by the judgment. If, however, the real owner had a good defence to the payment of the debt for which his land was sold, and was not a party to the *scire facias*, he is not precluded from making it, in a subsequent action for ejectment brought by the purchaser at sheriff's sale.

We express no opinion whether or not the matters set forth by the complainant in his bill would constitute a defence in an action of ejectment. These matters are not now under consideration. The only matter now under consideration is whether the justices can proceed to find judgment under the act of 1836 on the facts set forth in the bill respecting the time when complainants acquired title and which do not appear to be disputed.

Mr. Weightman, one of the defendants in the bill of complaint, and Louisa his wife, by deed dated the 16th of July, 1864, conveyed the premises in question to John C. Hawkins and Peter Dickinson, reserving an annual ground rent of

\$248.40. Hawkins and Dickinson erected a three story brick dwelling thereon, and by deed dated July 7th, 1865, conveyed said premises to Thomas Harrison.

Thomas Harrison et al., by deed dated 3d March, 1866, conveyed said premises to Edward Brady, executor and trustee appointed by the last will and testament of Mary A. Brady, deceased

The judgment against Hawkins and Dickinson was obtained May 20th, 1871, more than five years after the property had been conveyed to the complainant by Thomas Harrison, and more than six years after Hawkins and Dickinson had conveyed to Harrison. In such a case we think that justices cannot proceed to final judgment, if the required affidavit should be made by the complainant, or if the petition of the purchaser at sheriff's sale should show that the justices have no jurisdiction by reason of the person in possession not being the defendants in the execution whose property was sold, or that he did not come into possession under the tenant by title derived to him subsequent to the judgment, then the justices should not proceed, as it would be manifest from the petitioner's own showing that he was not within the terms of the act. And in such a case it would be doubtful if the person in possession would be required to make the affidavit mentioned in the act, as the petitioner himself would show that he was not within the terms of the act. In such a case it would seem that his only remedy would be by action of ejectment.

But as the purchaser at sheriff's sale is entitled to proceed under the act until the affidavit required by the act shall be made, or it shall appear from the proceedings that the justices have no jurisdiction, the special injunction granted in this case must be dissolved. If the justices should proceed to give judgment after the requisite affidavit shall have been made, or it should appear from the proceedings that they have no jurisdiction, then their proceeding would be without authority of law; and, having no jurisdiction so to proceed, they could be restrained by injunction from giving judgment and awarding possession. For though the act provides that a *certiorari* shall not be a supersedeas, it is only where the justices are proceeding within the terms of the act and have jurisdiction, that they and the parties cannot be restrained by a court of equity from proceeding to judgment and possession. It is to be presumed however, that the justices and jury will proceed according to the act and within the terms of the law; and so proceeding, they cannot be interfered with by injunction or other proceeding of the court.

The special injunction is dissolved.

Thomas J. Clayton and George S. Selden, Esqs., for plaintiffs.
Frank S. Simpson, Esq., for defendants.

Circuit Court of the United States, Eastern District
of Pennsylvania.

IN EQUITY.

JORDAN v.	WALLACE, No. 3.	
“ “	SCHOFIELD,	14.
“ “	YOUNG, et al.	20.
“ “	LEVIS,	61.
“ “	SCHOLES,	70.
“ “	HODSON,	71.

Where infringement of a patent is alleged in the bill, the respondents are bound to answer it distinctly and unequivocally.

Opinion by McKENNAN, C. J. Delivered November 11th, 1871.

The original answers in these cases present the same defences which were set up in *Jordan v. Dobson*. That case was exhaustively argued before a full bench of this court, and all the questions involved in it were carefully considered and decided, and an elaborate opinion was delivered by Mr. Justice Strong. The conclusions therein announced are now re-affirmed, and are, therefore, to be taken as decisive of the same questions presented in these cases.

Amendments of the respondents' answers have since been filed, which contain, as their only new feature, an averment of the incapacity of the patentee, by reason of mental unsoundness, to comprehend the specifications attached to the reissues of his patent in 1836 and 1864. As this averment is unsupported by any proof it is unnecessary to consider it.

A decree in favor of the complainant is now opposed upon the ground that he has not furnished satisfactory proof of infringement by the respondents.

Infringement is alleged in the bill, and the respondents are, therefore, bound to answer it distinctly and unequivocally. In their original answers their response to this allegation is qualified and equivocal. They do not deny the use of the invention described in the patent, but only that it was used "with a full knowledge of the premises mentioned in the said bill of complaint," and in violation of the complainant's exclusive rights secured by the patent of 1864. This clearly implies an admission of its actual use—and this implication is strengthened by the express admission in the amended answers, that the cards jacks and mules stated in their answers to be in use by the respondents, were made and constructed, in some respects, sub-

stantially in imitation of the improvement claimed by the patentee. Thus nobody failing to deny their alleged use of the complainant's invention, which he has a right to treat as a confession of its use, but by their mode of answering, impliedly admitting it, the complainant is not required to make any further proof of infringement. The complainant is, therefore, entitled to a decree, but as his patent expired on the 30th of August, 1869, it can only be for an account, which is accordingly directed in each case.

Hector T. Fenton and Furman Sheppard, Esqs., for complainant.

N. H. Sharpless, Geo. H. Earle and R. P. White, Esqs., for respondents.

[Legal Gazette, Nov. 17, 1871, Vol. 3, p. 371.]

Court of Common Pleas, Philadelphia County.

CITY OF PHILADELPHIA v. JOSEPH F. MARCER.

1. It is clear that the city treasurer of Philadelphia has a right to resign his office, but he cannot by such resignation take from the city any remedy for wrongs committed by him, during his term of office.
2. Suspension of the treasurer from office by councils, is not necessary to give the court jurisdiction under the 10th section of the consolidation act of February, 1854.
3. Under said section, a writ of sequestration against the city treasurer shall issue upon the proper affidavit and cause shown, and does not depend upon his suspension from office by city councils.
4. The fact that the defendant is liable to execution on his official bonds, does not affect the issuing of the writ.

PETITION OF THE MAYOR.

To the honorable the judge of the Court of Common Pleas for the city and county of Philadelphia:—The petition of the city of Philadelphia, the above named plaintiff, respectfully represents—

That the above named defendant, Joseph F. Marcer, was elected treasurer of the city of Philadelphia on the second Tuesday of October, A. D. 1869; that he, the said defendant, accepted and has filled said office, and entered upon its duties on the first day of January, A. D. 1870.

That the said defendant, before entering upon his office as city treasurer, took and subscribed an oath honestly to keep and account for all public moneys and property entrusted to his

care, agreeably to the acts of Assembly and the ordinances of the corporation. That the said defendant, by virtue of said office, had charge and custody of large sums of money belonging to said plaintiff, and also large amounts of the said plaintiff's bonds and loans. That by virtue of an act of Assembly entitled "An act to incorporate the city of Philadelphia," approved the 2d day of February, 1854, it is provided in the 10th section thereof, "The said treasurer (the city treasurer) shall keep the public moneys in such place and manner as the city councils shall direct, and shall verify his cash account at least once every week to the satisfaction of a standing committee of councils; and upon the affidavit of a majority of such committee of any default therein, the said (city) treasurer shall be suspended from office until the further action of councils; and the Court of Common Pleas of Philadelphia shall, upon said affidavit and cause shown, forthwith issue a writ of sequestration to the sheriff of the county against such defaulter for the amount of such default, to be levied of all his property, estate, and effects, in favor of said city," etc.

That a majority of said standing committee to verify the cash accounts of the city treasurer have made affidavit that the said Joseph F. Marcer, city treasurer, is in default, and that his accounts are in default to the amount of four hundred and seventy-eight thousand and forty-eight dollars and fifty-one cents, which affidavit is hereto annexed and made part hereof.

That by a resolution of the councils of said city, entitled a "Resolution relative to the defalcation of the city treasurer and instruction to the city controller, approved November 4th, 1871, it was provided that proper measures be taken for the sequestration of the estate of the said Joseph F. Marcer.

Your petitioner, therefore, prays your honorable court to award a writ of sequestration to sequester all the property, estates and effects of the said Joseph F. Marcer to the amount of said default, according to the act of Assembly in such cases made and provided.

And your petitioner will ever pray, etc.

DANIEL M. FOX,
Mayor of Philadelphia.

(Filed Nov. 10, 1871.)

AFFIDAVIT.

City and county of Philadelphia, ss.—William Bumm, Amos S. Ellis, Albert H. Ladner, John Bardsley, Alexander Hodg-

don, and Samuel G. King, having been duly sworn and affirmed according to law, depose and say:—

That they are members of a standing committee of councils, to wit: The committee to verify the cash accounts of the city treasurer; that Joseph F. Marcer was elected treasurer of the city of Philadelphia on the second Tuesday of October, 1869, for the term of two years, commencing on the first day of January, 1870, and that he accepted the said office, and has filled the same from the said first day of January, until the second day of November, 1871, and from thence hitherto.

That said committee were duly appointed in the month of January, 1871, and have served from thence hitherto.

That it is the duty of said committee, under the act of Assembly entitled an act incorporating the city of Philadelphia, approved February 2d, 1854, to examine the cash accounts of the city treasurer.

That the said Joseph F. Marcer, by virtue of his said office of city treasurer, had the custody and charge of large sums of money and large amounts of loans and bonds belonging to the city of Philadelphia.

That the said committee met on the second day of November, 1871, in the said city and county of Philadelphia, to wit: at the room of councils, to examine the accounts of the said city treasurer; that from an examination of said accounts your deponents do further say that they have ascertained and do depose that, by reason of breaches of official duty on the part of the said Joseph F. Marcer, the city treasurer, there is a deficiency in the city treasury of a total sum of four hundred and seventy-eight thousand and forty-eight dollars and fifty-one cents (\$478,048.51), hereinafter more specially mentioned.

That on and before the second day of October, 1871, the said city treasurer, Joseph F. Marcer, in violation of his duty as city treasurer, placed, or permitted to be placed in the hands of the firm of C. T. Yerkes, Jr., & Co., the sum of three hundred thousand dollars (\$300,000), moneys of the city of Philadelphia, for which he took and accepted the due bill of C. T. Yerkes, Jr., & Co. to David Jones, dated October 2d, 1871. That the said firm of C. T. Yerkes, Jr., & Co., has since failed, and that said due bill is uncollectable, and for which said sum of \$300,000 no consideration has been received by the said city of Philadelphia, whereby there is a defalcation in the said city treasury in the sum of three hundred thousand (\$300,000) dollars.

That the said treasurer, Joseph F. Marcer, has been in the habit and practice of negotiating the authorized loans of the city of Philadelphia; that of said loans the sum of one hundred and forty-five thousand dollars (\$145,000), were trans-

ferred on the books of the said treasurer, by him or his authority, to the following parties:—

Bank of Northern Liberties,	\$23,000
William G. Cochran,	28,000
N. B. Browne,	30,000
George Philler, vice-president,	25,000
Emily Briggs,	4,000
J. B. Roman,	300
Philip H. Fretz, Doylestown,	8,000
M. R. Richart et al.,	5,700
Mary Lanton,	4,800
Charles G. Pinney,	6,200
Drexel, Morgan & Co.,	9,000
Drexel & Co.,	1,000
	<hr/>
	\$145,000

in the respective amounts set opposite their names; all which amount of one hundred and forty-five thousand dollars of the said city loan was placed to the credit of the said firm of C. T. Yerkes, Jr., & Co., by said city treasurer on the books of said treasurer, before said transfers were made, and that no money or consideration whatever was paid to the city of Philadelphia at or before the time the said amounts of said loan was credited to C. T. Yerkes, Jr., & Co.; nor at or before the time the said loan was transferred, as before stated; nor has any consideration as yet been received by the city of Philadelphia for the said one hundred and forty-five thousand (145,000) dollars; whereby there is a further defalcation in the city treasury to the amount of \$145,000.

That the said city treasurer, has further in violation of his official duty, paid over to the said firm of C. T. Yerkes, Jr., & Co. the sum of thirty-three thousand and forty-eight dollars (\$33,048), for which no consideration whatever has been received by the city of Philadelphia, whereby there is a further defalcation in the said city treasury to the amount of \$33,048.

And the deponents, further say, that by reason of said defalcations on the part of the said Joseph F. Marcer, the city of Philadelphia is and will be greatly damaged.

WILLIAM BUMM,
JOHN BARDSLEY,
SAMUEL G. KING,
A. L. HODGDON,
A. H. LADNER.

(Sworn, affirmed and subscribed the 4th and 7th days of November, 1871.)

ANSWER OF JOSEPH F. MARCER.

The City of Philadelphia v. Joseph F. Marcer.—Answer of Joseph F. Marcer to the rule to show cause why a writ of sequestration should not be awarded as prayed for by a petition of the city of Philadelphia, filed the 10th day of November, 1871.

The said Joseph F. Marcer comes and saith that said petition shows that no writ of sequestration can issue, inasmuch as it does not appear therefrom, that, upon the affidavit of a standing committee of the councils of the city of Philadelphia, the said Joseph F. Marcer, as treasurer of said city, was suspended from said office by the councils of said city; and the said Joseph F. Marcer, without waiving the benefit of the above suggestion, for answer to said petition, saith that he entered upon the office of treasurer of the city of Philadelphia on the first day of January, 1870, and continued to act as said officer until the 2d day of November, 1871, upon which day he resigned said office; that on said day, upon informing councils of said city of his said resignation, they did fill the vacancy thereby occurring by choosing in joint meeting a successor.

And respondent further answering saith that from the commencement to the end of the period during which he was treasurer his cash account was duly verified in accordance with the act in said petition cited, and during said period no affidavit by the committee to verify his cash accounts was ever made of any default therein.

And respondent further answering saith that the city of Philadelphia required of him, before entering upon the duties of said office, not only to give bond, but to give a warrant, under which a judgment has been duly entered in the District Court of the county to December Term, and No. 103, and on which judgment an execution can issue, which can "be levied on all his property, estate and effects," with like force and effect, as is contemplated by a writ of sequestration, and respondent suggests that, by reason of the entry of the judgment aforesaid, the city of Philadelphia waived the benefit of the act cited in said petition in case of a default.

Wherefore the respondent, on the verification of the facts herein set forth in any manner by the court appointed, prays to be discharged with his costs.

Joseph F. Marcer being duly affirmed according to law, doth say, that the facts stated by him on his own knowledge are true.

JOSEPH F. MARCER.

(Filed, November 17, 1871.)

Opinion by PAXSON, J. Delivered November 23d, 1871.

This was a rule to show cause why a writ of sequestration should not issue against the above named defendant. The latter was elected city treasurer on the second Tuesday of October, A. D. 1869, and entered upon the duties of said office on the first day of January, A. D. 1870. The term for which he was elected will expire on the first day of January next.

On the fourth day of the present month (November) a majority of the standing committee of councils, who are charged by law with the verification of the cash account of the city treasurer, made affidavit to the fact, that the said Joseph F. Marcer, city treasurer, was a defaulter to the amount of \$478,048.51.

By resolution approved on said 4th day of November, 1871, the city solicitor was instructed to commence proceedings for the purpose of sequestering the estate of the said Joseph F. Marcer. The petition of the city of Philadelphia, filed by the mayor, upon which the above rule was granted sets forth *inter alia* the above facts; with the affidavit of the standing committee of councils above referred to, in which affidavit the particulars of the alleged default are stated.

The tenth section of the act of 2d of February, 1854, commonly called the consolidation act, provides for the election of the city treasurer, defines his duties, and imposes certain penalties for their violation. It is enacted by said section, *inter alia*, that "the said treasurer shall keep the public moneys in such place and manner as the city councils shall direct, and shall verify his cash account at least once every week to the satisfaction of a standing committee of councils, and upon the affidavit of a majority of such committee of any default therein, the said treasurer shall be suspended from office until the further action of councils, and the Court of Common Pleas of Philadelphia county shall, upon said affidavit and cause shown, forthwith issue a writ of sequestration to the sheriff of the county against such defaulter for the amount of such default, to be levied on all his property, estate, and effects in favor of the said city, which writ shall be a lien thereon from the issuing thereof, with a clause of attachment contained therein, directing the sheriff to arrest the body of such defaulter, to answer the said charge on the day certain, on which day the said court shall inquire of the premises, and enter judgment thereon, as may be just, or, in their discretion, to award an issue to try the disputed facts, and if the said court upon such hearing, shall be satisfied that there is probable cause to believe that such treasurer has committed the crime of perjury, as mentioned in this section, it shall be their duty to commit him for trial at the next Court of Quarter Sessions of said county."

It is under this section that the city now asks that the writ of sequestration may go out.

The defendant has filed an answer to the petition of plaintiff, in which he alleges, by way of defence:—

First. That no writ of sequestration can issue against him, because it does not appear from plaintiff's petition that the said defendant, as treasurer of said city, was or is suspended from said office by councils.

Second. That on the 2d day of November, A. D. 1871, the said defendant resigned the said office of city treasurer, and that upon said day the city councils, upon being informed of such resignation, filled the vacancy thereby created, by choosing in joint meeting a successor.

Third. That from the commencement of his term of office to the time of his resignation, the defendant's cash account as treasurer was duly vouched according to law, and that during said period no affidavit by the committee to verify his cash account was ever made of any default therein.

Fourth. That the defendant had given bond with warrant of attorney to the city, in the sum of \$100,000, upon which execution can issue with the same force and effect as a writ of sequestration.

I have before me a certified copy of the proceedings of councils, from which it appears that on the second day of November the resignation of Mr. Marcer as city treasurer was read and laid on the table; that upon the same day the select and common councils met in joint convention and elected Mr. Peter A. B. Widener, city treasurer, "for the unexpired term of Joseph F. Marcer;" that subsequently the securities of the said Widener were approved by councils, and that on the 16th day of November, the resolution of councils, approving said securities, was returned to common council by the mayor without his approval; whereupon the latter body passed said resolution over the veto of the mayor, by a vote of 40 yeas to 18 nays. That on the same day, the said resolution being before the select council for reconsideration, the further consideration of the same was postponed.

I do not propose to comment on the action of councils further than may be necessary to show its bearing upon the case now under consideration. It is for the people, whom the councils represent, to pass upon the propriety of their action. The court have only to do with its legal effect.

This case raises three important questions: 1. Had the city treasurer the right, under the law, to resign his office? 2d. If he had such right, can he, by its exercise, relieve himself from any liability or penalty which he may have incurred by reason of any official misconduct prior to his resignation? 3d. Can the writ

of sequestration issue against the defendant in the absence of his formal suspension from office by councils?

It requires no argument to sustain the general proposition that a public officer may resign. It is a right which has been exercised without question from the foundation of the government. There is no instance of a president ever having resigned his office; but the history of our own State furnishes an instance of a governor having done so; and cabinet ministers, judges and numerous other officers, both Federal and State, have, from time to time, resigned the offices to which they have been appointed or elected by the people. I know of no case in which a public officer has been constrained to exercise the functions of his particular office after resignation. It would seem, therefore, to be clear, that Mr. Marcer had a right to resign his office, and that after resignation there was no power in councils or elsewhere to compel him to continue to act as city treasurer. But it does not follow that because he may resign his office he can thereby avoid any liability, civil or criminal, previously incurred. To hold the contrary would place it in the power of any officer, after violation of the law, to evade the penalty thereof by tendering his resignation. To state this proposition is to refute it. In this case, if the allegations of the plaintiff be true, Mr. Marcer has incurred serious responsibilities, both civil and criminal, and he cannot, by his own voluntary act, take from the city any remedy which the law has given for its protection.

But it is alleged that the writ of sequestration cannot issue, because the defendant has never been suspended from office by councils. Why suspend him after resignation? Why go through a useless form when the defendant, by his own act, has rendered such course unnecessary, if not impossible? I am not clear that any formal action of councils is necessary to suspend a defaulting treasurer. The act says: "Upon the affidavit of a majority of such committee of any default therein, the said treasurer shall be suspended from office until the further action of councils," etc. It is a question whether, upon the making of the affidavit referred to by a majority of the said committee, the treasurer is not *ipso facto* suspended until the further action of councils. But whether this be so or not, suspension of the treasurer from office by councils is not necessary to give this court jurisdiction. In the case of a defaulting treasurer the law casts upon councils and upon the court certain duties. The former are legislative, the latter judicial. The requirement of the law in both cases is mandatory. When our jurisdiction has once attached no action of councils, nor any neglect of councils to obey the law, can interfere with it. What, then, is the duty of the court in the premises? The act referred to,

after providing that after the affidavit of default on the part of the treasurer, he shall be suspended from office until the further action of councils, goes on to say:—"And the Court of Common Pleas of Philadelphia county shall, upon said affidavit and cause shown, forthwith issue a writ of sequestration," etc. There is no provision here that the court shall issue such writ only in case city councils shall suspend the treasurer from office, but it is to issue upon affidavit and cause shown.

We do not regard the fact that the defendant is liable to execution on his bond as having any bearing upon this case. The plaintiff is entitled to all the remedies provided by law. And if it were otherwise it is sufficient answer to this suggestion to say that an execution upon said bond could only issue in the sum of \$100,000, while the default of the treasurer is alleged to be \$478,048.51. The sequestration will cover all the defendant's estate, and hold it to meet his liability to the city.

I have avoided making any comment upon this case, beyond the discussion of its legal principles. While we may deeply regret the unfortunate position of this defendant we cannot forget that the aid of the court is invoked to enforce the law. Were we to do less, we should betray the high trust reposed in us by the people.

And now, November 23d, 1871, it is ordered by the court that the rule in this case be made absolute, and that the writ of sequestration prayed for be issued as provided by law, and that the said writ shall contain a clause of attachment directing the high sheriff of the city and county of Philadelphia to arrest the body of the said Joseph F. Mercer, and him safely keep, to answer the said charge in the said petition contained, on Monday morning next, at 10 o'clock, and to abide the further order of the court in the premises.

As this is a case of public importance, it is proper to say that all of my colleagues concur in this opinion.

[Legal Gazette, Dec. 1, 1871, Vol. 3, p. 300.]

Court of Common Pleas, Philadelphia County.

IN EQUITY.

HARTNACK et al. v. JAMES et al.

1. If an injunction be asked for to stay legal proceedings, the necessity should be urgent and the case free from doubt, and it should appear that the relief prayed for could not be obtained by or through the legal proceedings already commenced.
2. A general receipt for rent given by the lessor to the tenant in possession, who is the assignee of the unexpired term of a lease, is not an implied letting of the premises to the tenant for a new term, but is entirely consistent with the existing lease.

BILL IN EQUITY.

To the honorable the judges of the said court:

Your orators complain and say:

1. That on the 12th day of June, A. D. 1871, your orators bought from one William Marks the good will, stock and fixtures of the hotel, situate and being No. 801 Sansom street, in said city, and the same day went into possession of the premises.

2. That, at the time of the purchase and taking possession as aforesaid, your orators were informed by the said William Marks, that the premises named were owned by the said Amanda James; that, on or about the 2d day of July, in the year aforesaid, said Amanda James demanded from your orators the payment of one month's rent, viz.: \$83.33; that your orators paid the same to the said Amanda James in person, and took her receipt for the same, and she agreed with your orators that they might and should remain in possession.

3. That your orators are informed and believe that the said Amanda James has brought suit before Alderman Wilson Kerr, of said city, against one Thomas R. Steele, who, as your orators are informed, was formerly in possession of said premises as tenant, for the recovery of the possession of said premises and a writ of possession has been served upon your orators by said John Daley, who intends, forthwith, to turn your orators, and their goods and chattels, into the street.

4. That your orators never knew the said Steele to have been the lessee of said premises, and that no proceedings have been commenced by said Amanda James against your orators; that your orators never knew the said Steele, nor had any business relations with him whatsoever.

In these circumstances your orators need equitable relief:

I. They ask that the said defendants be restrained by this honorable court from proceeding to execute the said writ of possession against your orators, and that the court will grant a special injunction until the final hearing of the above complaint.

II. That your orators may have such other and further relief as may be necessary.

CHARLES SIDEBOTHAM,
For Plaintiffs.

ANSWER OF AMANDA JAMES ET AL.

To the honorable judges of the said court :

The answer of the defendants to the bill of complainants :

I. That the said Amanda James, by lease dated December 17th, 1868, demised the dwelling house, No. 801 Sansom street, to Thomas R. Steele, his heirs, executors, administrators, successors, and assigns, for the term of three years from January 1st, 1869, to be used by him in connection with the store No. 116 South Eighth street, then occupied by him as a millinery store. That in accordance with the terms of said lease, and the agreement between the parties, the said lessee, at his own expense, made doors between the said two properties, and they were, as agreed upon, used together for the said millinery business. That there was no provision in said lease against assigning the same, or underletting the premises. That shortly after the execution of the said lease, much to the surprise of the said Amanda James, and contrary to her wishes and desires, the said Thomas R. Steele closed up the doors between said two properties, and sold out the unexpired term of his lease, and transferred the premises to the Tully Brothers, to be occupied and used as a tavern and liquor saloon, and they sold out to other parties their rights in the premises, which were subsequently taken in execution and sold by the sheriff, and the unexpired term of the lease transferred by him to Marks and Largey, and the interest of Marks in said lease, transferred by him to the said Charles Hartnack.

II. That shortly after July 1st, 1871, the day upon which the month's rent upon said lease became due, Hartnack and Largey went out to defendant's residence, at Germantown, and told her that plaintiff's had purchased the stock and fixtures of the tavern, and unexpired term of the lease, and paid her the month's rent due July 1st, she giving a receipt to them for the same, with the distinct understanding between them that it was for one month's rent, due under the lease to Steele. They then urged and entreated her to promise to give them a renewal of the lease after the present lease to Steele, which had been transferred to them, should expire on January 1st, 1872. This she peremptorily and positively refused to do (as admitted by plaintiffs within a few days past), as she was opposed to her property being used for the sale of liquor, she having rented it to Steele, as she supposed, only for business purposes.

III. That since July no money or rent having been paid by

the said Steele or the plaintiffs, the parties residing on the premises under him, proceedings were instituted by the said Amanda James to obtain possession of the premises for the non-payment of the rent in accordance with the act of Assembly of April 3d, 1830. Purdon, p. 614, pl. 21. That on September 27th, 1871, the thirty days' notice to quit, provided by said act of Assembly, was served personally on said plaintiffs residing on the said premises, and a copy left with them, as well as upon the said Steele. The parties having failed to remove from and deliver up said premises to the lessor or pay the rent in arrear, a precept was issued by Alderman Wilson Kerr to John Daley, constable, to summon the lessee under said lease, which precept was served by said constable upon the said Steele, and upon the said plaintiffs, the parties residing on the premises, and on the hearing on October 31st, 1871, judgment for possession was rendered by said alderman, and after the five days allowed by the said act of Assembly for the parties to enter security and take an appeal, and in which time no security was entered by them or appeal taken, the said alderman on November 13th, 1871, issued his writ of possession to the said constable, who was about to execute it, when restrained by the special injunction granted in this case.

IV. That when the writ of special injunction in this case was served personally by the said Hartnack upon the said Amanda James on November 16th, 1871, she asked him why the plaintiffs had not paid the rent due upon said lease to Steele and assigned to them, and he replied that as they held the property under said lease to Steele and proceedings had been commenced upon it, he did not know whether he was to pay it to her or to Steele.

All which matters the said Amanda James is ready and willing to maintain as the court may direct, and prays to be hence dismissed with her costs and charges in this behalf most wrongfully sustained.

AMANDA JAMES.

ANSWER OF JOHN DALEY.

That I am a constable of the city of Philadelphia. That on September 27th, 1871, I served the thirty days' notice to quit, mentioned in the answer of the said Amanda James, upon Thomas R. Steele, by leaving the same with an adult member of his family, at his residence, and also personally on the premises on said Hartnack and Largey, the said plaintiffs residing upon the demised premises and left a copy of said notice with them. That the precept or summons from Alderman Wilson Kerr was issued by him to me on October, 28th, 1871, and served on that day

upon said Steele by leaving it at his residence with an adult member of his family, and personally on the premises on Hartnack and Largey, the plaintiffs residing upon the demised premises. That judgment for possession was rendered in favor of the lessor at the hearing of the case, and after the five days allowed by law by the act of Assembly for entering security and taking an appeal, within which time no security was entered or appeal taken, and a writ of possession was then issued by the alderman to me, which I was about executing when stopped by the special injunction.

JOHN DALEY.

Opinion by FINLETTER, J. Delivered November 23d, 1871.
Motion to dissolve special injunction.

On the 17th day of December, 1868, the defendant, Amanda James, demised the dwelling house, No. 801 Sansom street, to Thomas R. Steele, his heirs, executors, administrators, successors and assigns, for the term of three years. Subsequently, possession of the premises was obtained by ***** "and they were sold by the sheriff, and the unexpired term of the lease transferred by him to Marks and Largey, and the interest of Marks in said lease transferred by him to one of the complainants, Charles Hartnack."

The rent was payable monthly, but none has been paid by any one since July 1st, 1871. On the 27th day of September, a thirty days' notice to quit the premises "was served upon Steele, and, also, personally on the premises on Hartnack and Largey, the plaintiffs residing on the demised premises, and a copy of said notice left with them." On the 28th day of October, Alderman Kerr issued his summons, which was served upon Steele, "and personally on the premises on Hartnack and Largey."

Judgment for possession was duly entered, and after the expiration of five days a writ of possession was issued. Whereupon the plaintiffs filed their bill, and a special injunction for five days was allowed. The defendants have entered a motion to dissolve the special injunction.

The potency of injunctions, especially to restrain a meditated wrong, has made them a favorite means of prevention as well as of redress. It is at all times a power to be used with extreme caution, and only when required by an imperative exigency.

If it be invoked to stay the regular process of legal proceedings, the necessity should be urgent and the case free from all difficulty and doubt. Even then, it should appear that the relief prayed for could not be obtained by or through the legal proceedings already commenced; otherwise there would not only be an apparent conflict of jurisdiction, but a multiplicity

of suits arising out of the same cause of action, or in reference to the same legal rights.

These principles apply with greater force to "special injunctions," which must of necessity be granted upon a hasty and partial examination of the merits of the controversy, and are always of grace and discretion, and not of right.

In the present case the plaintiffs have made no effort to maintain their legal rights in the suit before the alderman, although they had more than a month's notice that their possession of the premises would be involved in that proceeding.

The plaintiffs allege that on the 12th day of June, 1871, they purchased the good-will, stock and fixtures of the premises from William Marks, and went into possession. That on the 2d day of July, Amanda James demanded from them the payment of one month's rent, viz.: \$88.33, and they paid the same to her and took her receipt for the same; and she agreed with them they should remain in possession. The receipt is as follows;

Received, Philadelphia, July 8th, 1871, of Messrs. Hartnack & Largey, eighty-three 33-100 dollars, being in full for one month's rent in advance, due July 1st, 1871.

\$88 33-100.

(Signed)

AMANDA JAMES.

This is all the title the plaintiffs have set out in their bill or proved. They claim that it is a letting to them by Amanda James, for one year at least, from July 1st, 1871.

It is not clear that this is a letting, or that it, by necessary implication, creates the relation of landlord and tenant between the parties. It is entirely consistent with an existing demise to Steele, and at best, is but a permission to remain upon the premises, subject, however, to all the conditions of that demise.

The purchase from Marks gave the plaintiffs the right to his term, whatever it may have been, and no more. His title was derived indirectly from Steele, and was subject to all the incidents of the lease from Amanda James. The various transfers of the property did not change the relations of lessor and lessee; nor did they in any particular modify any of the rights of the lessor. She might, if she thought proper, receive the rents from any person, and when no rent was paid she was compelled to proceed against her lessee alone, with notice, however, to whomsoever might be in possession.

Even if the relation of tenancy necessarily arises from the facts alleged by the plaintiff, their title, as set out in the bill, lacks the particularity required in cases of this character. An allegation of a fee simple without more has been held insufficient. *Whitelegg v. Whitelegg*, 1 Bro. C. C. 57. In *Fitzpatrick v. Childs*, 6 Phil. 135, the plaintiff averred that "he occupied the premises which he rents from said defendant at an annual

rent of \$1800 per annum, and that his current year will end on the first day of January, A. D. 1867." Peirce, J., held this to be an insufficient averment of title.

In addition, there is a want of merit in the plaintiffs' case. He who seeks equity must do equity. The proceedings which we are asked to stay by injunction would have had no basis if the plaintiffs had paid the rent, which, upon their own showing, they were bound to pay. After the proceedings had been commenced and had ripened into judgment, the most effective of all injunctions was in their own hands. Payment of the rent by them would not have been an admission of the right of Amanda James to bring suit against Steele; nor would it have affected their rights as tenants. It would have been regarded as a payment upon compulsion. In any event they could have paid under protest, and with a reservation of all their rights.

The special injunction is dissolved.

C. H. Sidebotham, Esq., for complainants.

J. Sergeant Price, Esq., for defendants.

[Legal Gazette, Dec. 1, 1871, Vol. 3, p. 391.]

Court of Common Pleas, Philadelphia County.

POTTS v. PHILADELPHIA ASSOCIATION FOR THE RELIEF OF DISABLED FIREMEN.

1. A corporation cannot make a by-law which contravenes the provisions of its charter.
2. The charter of the "Philadelphia Society for the Relief of Disabled Firemen" expressly provides that its funds shall be appropriated to no other objects than those for which the society is instituted.
3. These objects are the relief of disabled firemen, their widows and orphans, and such persons not firemen, who may sustain personal injury by fire apparatus.
4. A proposition to pay retiring members a portion of the funds of the society, is not authorized by its charter.
5. The change from a volunteer to a paid fire department has no bearing upon the case.
6. The property is held by the association in trust to be applied to purposes of charity, and cannot be applied to different objects.

CASE STATED.

And now September 1st, A. D. 1871, it is hereby agreed by and between the parties to the above suit that the following case be stated for the opinion of the court in the nature of a special verdict:

1. That upon the 24th day of November, A. D. 1834, certain persons, members of the fire department of the city and county of Philadelphia, associated themselves together under certain

articles of association, a copy of which is hereto annexed, marked "Exhibit A," page 55, &c., and were thereafter, to wit, upon the 23d day of March, A. D. 1835, under and by virtue of a certain act of Assembly entitled "An act to incorporate the Philadelphia Association for the Relief of Disabled Firemen," created and declared to be one body politic and corporate.

2. That by the said act of Assembly, a copy of which is hereto annexed marked "Exhibit A," page 51, &c., it was provided:

"Article I. The object of the association shall be the relief of disabled firemen, their widows and orphans, and the relief of persons not firemen, who may sustain personal injury by fire apparatus.

"Article II. The government of the association shall be vested in a board of twenty-one trustees.

"Article III. The funds of the association shall be permanently invested, and the interest arising therefrom shall be appropriated to no other objects than those for which the society is instituted."

3. That by the said act of Assembly it was also provided "that the yearly rent and profits of the real estate held by the said corporation shall not exceed the sum of six thousand dollars," and also that the said corporation should be able "to ordain, establish, and put in execution such by-laws, ordinances, and regulations as shall appear necessary and convenient for the government of the said corporation, not being contrary to this charter, or the Constitution and laws of the United States, or of this commonwealth, and generally to do all and singular the matters and things which to them it shall lawfully appertain to do, for the well being of the said corporation, and the due management and ordering of the affairs thereof."

4. That the funds and other property of the corporation, defendant, amounted on the 31st day of December, A. D. 1870, to the sum of \$41,558.32, and consisted of

United States 5-20 Loan,	\$13,000 00
City of Philadelphia Loan,	18,000 00
Bonds and Mortgages,	3,400 00
Ground rents,	7,158 32
Total,	<u>\$41,558 32</u>

That the said amount was realized from the following sources:

1. From dues and fees paid by members of the fire department, who were members of said corporation, to wit, the sum of one dollar upon becoming members of the said corporation, and the sum of one dollar annually thereafter for ten years.

2. From life membership fees of twenty dollars paid to said corporation by citizens not members of the fire department.

3. From fines and penalties imposed by certain acts of Assembly, and made collectable by and payable to said corporation.

4. From donations to said corporation, and

5. From legacies, viz.:

A. Under the last will of Peter A. Blenon, deceased, \$1,800 was bequeathed for "charitable purposes."

B. Under the last will of Paul Beck, Jr., deceased, a legacy of \$500 bequeathed to the said association generally.

C. Under the will of Ann Hertzog, deceased, a legacy of \$3,000, bequeathed to the defendants, "to be applied to the charitable objects and purposes of said association."

5. That the members of the corporation defendant number thirteen hundred and fifteen, and consist of

1. Members of the fire department of the city of Philadelphia who have paid the fees and dues above specified.

2. Citizens not members of the said fire department, who have paid the life membership fee of twenty dollars.

3. Others who have, from time to time, been elected to life membership for services rendered to the association.

6. That the volunteer fire department of the said city was dissolved by an ordinance of councils, approved December 29th, 1870, and was thereby divested of and denied all right or authority to participate in the extinguishment of fires or to use its fire apparatus, or exercise any powers of a fire department; and there was created and is now existing in the said city, a paid fire department, whose business it is to extinguish fires; of which paid fire department eighty-eight of the members were formerly members of the volunteer fire department, and were then and still are members of this association.

7. That the members of the corporation defendant, at a meeting held on June 12th, 1871, enacted the following amendments to the articles of association:

"Article IV. Sec. 2. Strike out all after the word 'funds' up to the word 'body,' also strike out the words 'how many admitted,'" insert a new section.

Sec. 3. The association shall fill all vacancies which may occur in the board of trustees at the next ensuing meeting.

Article V. Insert in the first line after the word "association," "previous to the organization of the paid fire department." Strike out all after the word "trustees" in the sixth line, insert a new section.

Sec. 2. "This association shall have power by a vote of two-thirds of its members present at a general meeting, to make donations for such purposes as they shall deem expedient," also,

Sec. 3. "Any member wishing to withdraw from the association shall receive a donation of twenty-five dollars (\$25), said donation to be granted as prescribed in section 2 of this article."

And at the same meeting, the following resolutions were agreed to:

1. "That the trustees be instructed to immediately convert the stock and bonds of the association into cash, for the purpose of providing for any contingency that may arise from resignation of members or otherwise."

2. "That the secretary and treasurer sit at the hall of the fire association, or any other suitable place, three nights in a week, after Monday night next, to receive resignations, and pay over the twenty-five dollars."

3. "That the secretary be instructed to draw, and the president to attest, warrants on the treasurer of the board of trustees for twenty-five dollars in favor of any member tendering his resignation."

8. That the association ever since its formation has applied the interest upon its funds to "the relief of disabled firemen, their widows and orphans, and the relief of persons not firemen," who have sustained "personal injury by fire apparatus." Up to the first day of January, A. D. 1871, the amount which had been so applied was \$42,200.36 (see Exhibit A, page 6); while there has been applied during the year 1871, and since the organization of the paid fire department, to the same purposes the sum of \$1,418.66, which sum has been distributed among twenty-four firemen and ten widows and orphans of deceased volunteer firemen. Of the twenty-four firemen relieved, twenty-two were sick from disease contracted by exposure at fires, in the volunteer service, one is a member of the insurance patrol, and one an attaché of the paid fire department. The latter two were injured by accidents at fires, and are members of the said association. Of the whole amount appropriated (\$1,418.66), \$350 were for expenses of burial of seven volunteer firemen, members of the association.

9. That the plaintiff is a member of the corporation defendant, and before the bringing of suit made application in writing to the said corporation as follows:

"Phila., June 22, 1871.

To the Philadelphia Association for the Relief of Disabled Firemen.

I, the undersigned, a member of your association, wishing to withdraw from your association under the provisions of article VI., sec. 3, of the articles of association, hereby notify you of

the same, and demand the payment of the donation of twenty-five dollars as therein provided.

Respectfully, REGINALD H. POTTS,
580 Market street."

10. That the withdrawal of plaintiff was accepted, and the corporation defendant "by a vote of two-thirds of its members present at a general meeting," donated to plaintiff the sum of twenty-five dollars, and directed the secretary to draw a warrant, in favor of the plaintiff upon the treasurer, for the payment of the same.

11. That the plaintiff demanded the payment of the said sum of twenty-five dollars, but the secretary of said corporation refused to draw a warrant upon the officer charged with the payment of the same, alleging that the corporation had no power or authority to make such donation, and that such appropriation of the funds of the association was in violation of the charter of defendants, and the law of the land; so that payment could not be made to said plaintiff; upon which refusal plaintiff brought this suit to recover the said sum.

12. If the court be of opinion that the plaintiff is legally entitled to recover the said proposed donation of twenty-five dollars, and that the donation by the members of the said association to the plaintiff, of the said sum was lawful, and not in violation of the provisions of the act of incorporation, articles of association of the defendants, or of the uses and purposes for which the funds of the said association were originally bequeathed and contributed, then judgment to be entered for the plaintiff for the sum of twenty-five dollars, but if not, then judgment to be entered for the defendants. Either party having the right to sue out a writ of error.

EDWARD R. WORRELL,
Attorney for Plaintiff.

RICHARD C. WINSHIP,
HENRY S. HAGERT,
Attorneys for Defendants.

Opinion by PAXSON, J. Delivered December 2d, 1871.

The "Philadelphia Society for the Relief of Disabled Firemen" was incorporated by act of Assembly of 23d of March, 1835. The act of Assembly referred to provides *inter alia*:

1. The object of the association shall be the relief of disabled firemen, their widows and orphans, and the relief of persons not firemen, who may sustain personal injury by fire apparatus.

2. The government of the association shall be vested in a board of twenty-one trustees.

3. The funds of the association shall be permanently in vested, and the interest arising therefrom shall be appropriated to *no other object than those for which the society is instituted.*

The funds and other property of the corporation defendant, amounted, upon the 31st day of December, A. D. 1870, to the sum of \$41,558.32, and consisted of

United States 5-20 loan,	\$13,000 00
City of Philadelphia loan,	18,000 00
Bonds and mortgages,	3,400 00
Ground rents,	7,158 32

Total,	\$41,558 32
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The said amount was realized from the following sources:

1. From dues and fees paid by members of the fire department, who were members of said corporation, to wit, the sum of one dollar upon becoming members of the said corporation and the sum of one dollar annually thereafter for ten years.

2. From life membership fees of twenty dollars paid to said corporation by *citizens not members of the fire department.*

3. From fines and penalties imposed by certain acts of Assembly and made collectible by, and payable to said corporation.

4. From donations to the said corporation, and

5. From legacies, viz.:

A. Under the last will of Peter A. Blenon, deceased, \$1,300, was bequeathed for "charitable purposes."

B. Under the last will of Paul Beck, Jr., deceased, a legacy of \$500 bequeathed to the said association generally.

C. Under the will of Ann Hertzog, deceased, a legacy of \$3,000 bequeathed to the defendants, "to be applied to the charitable objects and purposes of said association."

The members of the corporation defendant number thirteen hundred and fifteen, and consist of

1. Members of the fire department of the city of Philadelphia, who have paid the fees and dues above specified.

2. Citizens not members of the said fire department, who have paid the life membership fee of twenty dollars.

3. Others who have, from time to time, been elected to life membership for services rendered to the association.

The volunteer fire department was dissolved by an ordinance of councils, approved December 29th, 1870, and was thereby divested of and denied all right or authority to participate in the extinguishment of fires or to use its fire apparatus, or exercise any powers of a fire department, and there was created and is now existing in the said city a paid fire department, whose business it is to extinguish fires, of which paid fire department eighty-eight of the members were formerly members of the

voluntary fire department and were then and still are members of this association.

The members of the said corporation, at a meeting held on the 12th day of June, 1871, enacted certain amendments to the articles of association, the most important of which is the following:

"Any member wishing to withdraw from the association shall receive a donation of twenty-five dollars (\$25), said donation to be granted as prescribed in section 2, of this article."

Section 2, above referred to, provides that "this association shall have power, by a vote of two-thirds of its members present at a general meeting, to make donations for such persons as they shall deem expedient."

The other amendments were evidently intended to curtail the power of the trustees, and to compel a distribution of the funds of the association. At the same meeting resolutions were passed, instructing the trustees to immediately convert the stock and bonds of the association into cash, "for the purpose of providing for any contingency that may arise from resignation of members or otherwise;" providing further, "that the secretary and treasurer shall sit at the hall of the fire association, or any other suitable place, three nights in a week * * * to receive resignations and pay over the twenty-five dollars;" and instructing, in the last place, "the secretary to draw, and the president to attest, warrants on the treasurer of the board of trustees for twenty-five dollars in favor of any member tendering his resignation."

The plaintiff is a member of the corporation defendant, and before the bringing of suit made application in writing to the said corporation as follows:

"Phila., June 22, 1871.

To the Philadelphia Association for the Relief of Disabled Firemen.

I, the undersigned, a member of your association, wishing to withdraw from your association under the provisions of article VI, sec. 3, of the articles of association, hereby notify you of the same, and demand the payment of the donation of twenty-five dollars as therein provided.

Respectfully,

REGINALD H. POTTS,
530 Market street."

The withdrawal of plaintiff was accepted, and the corporation defendant "by a vote of two-thirds of its members present at a general meeting" donated to plaintiff the sum of twenty-five dollars, and directed the secretary to draw a warrant, in favor of the plaintiff upon the treasurer, for the payment of the same.

The secretary of the said corporation refused to draw a war-

rant in favor of the plaintiff, as above directed, and this amicable action was entered to test the right of the plaintiff to the said sum of twenty-five dollars, and a case stated for the opinion of the court.

It may well be questioned whether the amendments to the "articles of association," above referred to, have any validity whatever. They certainly have none so far as they conflict with the charter of the company. A corporation cannot make a by-law which contravenes the provisions of its charter. *Angell & Ames on Corp.* § 343; *Kearny v. Andrews*, 2 Stock. 70; *St. Luke's Church v. Mathew*, 4 Des. 578; *Rex v. Cuthbert*, 4 Burr. 2204; *Newburg v. Francis*, 3 Dungal. & E. 189; *Rex v. Spencer*, 3 Burr. 1839. It will be observed that the entire government of the association is vested in a board of twenty-one trustees, who are to be elected annually. It would seem therefore that the corporation can only act through its trustees, and any attempt of the members to act independently of them, and in opposition to them, in a matter pertaining to the government of the corporation, is in violation of the charter. But we do not decide this case upon this ground, for there is another and more serious obstacle, in the way of the plaintiff. The charter of the association expressly provides that its funds shall be appropriated to "*no other object than those for which the society is instituted.*" What are those objects? They are clearly defined by the charter, and they are

1. The relief of disabled firemen.
2. The relief of their widows and orphans; and,
3. The relief of persons not firemen, who may sustain personal injury by fire apparatus.

The plaintiff does not claim to belong to either of these classes. But he contends that because the volunteer fire department has been abolished, and a paid fire department substituted in its place, that the funds of this association, which were contributed for the three specific objects above named, shall be divided between the members of the association. This proposition cannot be sustained upon any principle of law. It is expressly prohibited by the terms of the charter.

It is not even alleged that it has become impossible to apply this fund as directed by the charter. Nor could it be so alleged successfully, as it is shown by the transactions of the association itself, that up to the 1st day of January, A. D. 1871, the amount which had been so applied was \$42,200.86, while there has been applied during the year 1871, and since the organization of the paid fire department, to the same purposes, the sum of \$1,418.66, which sum has been distributed among twenty-four firemen and ten widows and orphans of deceased volunteer firemen. Of the twenty-four firemen relieved, twenty-two were sick from

disease contracted by exposure at fires, in the volunteer service, one is a member of the insurance patrol, and one an attaché of the paid fire department. The latter two were injured by accidents at fires and are members of said association. Of the whole amount appropriated (\$1,418.66), \$350 were for expenses of burial of seven volunteer firemen members of the association.

It will be seen that the benefits of this fund are not limited to such disabled firemen, as may be members of this association, nor to the widows and orphans of members, while it is expressly extended to persons injured by fire apparatus, who are not firemen. And were it otherwise, a considerable number of the members of the association are members of the paid fire department.

We cannot regard the change from a volunteer to a paid fire department as having any bearing upon the case. The fund in controversy was contributed for specific charitable purposes. The original law of the association provides that it shall be applied to no other purpose. The need is as great now as it ever was, for the employment of the fund in the manner above indicated. The designated objects of bounty still exist—others are being added almost constantly. So long as we have fires, we shall have disabled firemen, and widows and orphans of disabled firemen as well as citizens injured by fire apparatus who are not firemen. This fund was contributed for a most noble charity. It has done much in the past to alleviate suffering, and to comfort those whose husbands and fathers have fallen victims to the unselfish daring which has always marked the firemen of this city. I deem it probable that the members of this association have not clearly apprehended the full force and effect of the proposition to divide this money among the retiring members. For I am sure that if they had clearly understood it to be a trust fund for the benefit of the disabled, the widows and fatherless, they would have preferred to have added to it, rather than to divert any portion of it from its legitimate object.

We hold that this is a charity; the property is held by the association in trust to be applied to purposes of charity and beneficence. That property so held cannot be applied to different objects is too well settled to need any copious citation of authorities. I will refer only to the following: *Hill on Trustees*, p. 462, 466; *Duke on Charitable Uses*, 571; *Lane's Rep.* 115; *Man v. Ballet*, *Vernon*, R. 42; *Atty. Gen. v. Huberdasher's Co.* 1 Br. P. C. 9; *Mayor of Coventry v. Atty. Gen.* 2 *Ibid.* 236; *Sir Thomas Middleton's Case*, Mo. 881; *Atty. Gen. v. Platt*, *Finch's Cases*, 221; *Thomas v. Ellmaker*, 1 *Parsons*, 98, 108, 113; *Brown v. Lutheran Church*, 11 H. 495; *Allen v. McKee*, 1 *Sumner*, 303.

Judgment for the defendant upon the case stated.

District Court, Philadelphia County.

BUTCH v. BOYER.

An action was brought upon a promissory note, given by defendant to plaintiff, in part payment for the right to manufacture in Pennsylvania, "Hooten's Patent Heater." The defence was failure of consideration, because of the alleged invalidity, through want of novelty, of the letters patent. The verdict was for the plaintiff, and on a motion on behalf of defendant for a new trial, *the court held*:

1. The offers of evidence by the defendant on the trial, all of which were excluded, did not propose to show, that in point of fact, there were any previous machines, which were suggestive to a skilled mechanic of the machine in question.
2. None of the offers to show that the machine itself was old, closely approached the required standard, except the seventh, which was excluded, because the witness who was to make good the offer had made a deposition which had already been read in evidence.
3. We have not been convinced that the several propositions of evidence went further than to show the prior existence of machines, some resembling the machine in question in its component parts, some identical with it in the use to which it was applied, and one very similar to it in its general operation. These propositions are insufficient, and the rule for a new trial is therefore discharged.

Motion for a new trial.

Opinion by LYND, J. Delivered December 5th, 1871.

This was an action upon a promissory note, given by defendant to plaintiffs, in part payment for the right to manufacture in the State of Pennsylvania, "Hooten's Patent Heater." The defence was failure of consideration, because of the alleged invalidity of the letters patent.

"Hooten's Patent Heater" was intended to apply exhaust steam to the heating of water for the use of engines. It consisted of a vertical cylinder or box, with a series of inside shelves, the water being admitted from above, descending in thin sheets or spray, from shelf to shelf, commingling with the steam admitted from below, and then passing out at the bottom to supply the engine, while the steam finally passed out at the top of the machine.

By the letters patent the "mere passing of steam through water for the purpose of heating it" was not claimed; but the claim was for "the *arrangement* of the induction and eduction pipes A and B, the induction and eduction pipes I and O, the waste water pipe S and the alternating opposite plates or shelves * * * *with each other, and with the vertical box or tube D*, of the apparatus, when the said plates or shelves are placed at *such* distances from each other that the water can be made to fall in succession from one shelf to another in broadly expanded and thin sheets, and whilst thus falling, be acted upon by the ascending steam within the apparatus in the manner herein set forth."

The sole ground of invalidity assigned was the want of *novelty* of the thing patented.

At the trial the defendant was required to prove the previous existence of either, first, a machine with substantially the *same* arrangement of the parts, and of the whole as the patented machine; or secondly, a machine so like the patented one, that with a knowledge of the former, no inventive genius would be required to produce the latter. It was held, that proof of the pre-existence of a *similar* machine merely would not establish the want of novelty of the machine in question; but that there must be *further* proof that the latter was the plain result of the former.

With this view he made seven several offers of evidence, all of which were excluded and exceptions allowed. To all these offers the following general observations will apply; first, that while all of them propose to show the previous existence of machines that might *possibly* be suggestive to a skilled mechanic of the machine in question, yet in none was it proposed to show, that in point of fact, there was such suggestiveness in any of the old machines referred to; secondly, that none of the offers to show that the machine itself was old, closely approached the required standard, except the seventh, and that was excluded, because the witness, who was to make good the offer, had made a deposition upon the subject, *which had already been read in evidence*. Neither the time of the court nor fairness to the plaintiff admitted of the rehearing of this witness; particularly as the said deposition would not have sustained the offer: indeed it had been stricken out, after having been read in evidence, because it failed to sustain a less comprehensive offer.

The offers in detail were to show:

1. "The use of a similar heater twenty years ago, *i. e.*, a machine where the steam was condensed and the water heated by mutual contact, and where, by the intervention of a shelf, the water fell as spray or shower, thus facilitating the operation of the machine. To be followed up by showing that a machine exactly like this has been used in the purification of gas."

The first branch of this offer is to show a machine, whose purpose was the same as that of the machine in question, and that purpose was facilitated by the intervention of a shelf; but it is not pretended that the machines are alike in their parts; nor therefore, that there is any similarity in the arrangement thereof; nor that the latter machine is not an advance upon the former. The second branch of the offer is, evidently, an independent proposition, and, however great its individual merit, it not only cannot help the first branch, but must perish with it.

2. "That a machine with the same arrangement of alternating shelves and *one* set of induction and eduction pipes was

described in a public work published some years before the application for this patent and used for the purification of gas."

This offer obviously fails as to sameness of parts; nor can any connection be perceived between the *condensation* of steam and the *purification* of gas, though the medium in each case might be the same—cold water. If there be any such connection, the offer should have expressly indicated it.

8. This offer is substantially the same as number two, and requires neither statement nor comment.

4. "Deposition of H. P. M. Birkenbine, to show the existence of a machine in 1856 for the purification of gas, with a similar arrangement of induction and eduction pipes, which condensed the impurities of the gas in a similar way and the hot gas heated the water."

This offer of the deposition having been overruled, the defendant again offered it to show that

5. "A cylinder used for the purification of gas, with the same arrangement of the induction and eduction pipes, both series of alternating shelves and plates with each other and with the vertical box, was in use in 1856."

Upon this offer the defendant was permitted to read the deposition in evidence; and, after the reading of it, it was stricken out, because the plan of the machine referred to therein showed that one eduction pipe was wanting, and that there was not the same arrangement of the *remaining* induction and eduction pipes and of the alternating shelves with each other and with the vertical box. However relevant and material this deposition may be in view of other propositions for the defence, it has entirely failed to support that in behalf of which it was adduced.

6. "That there was in use, at the Washington Print Works, twenty years ago, a machine for heating the feed water of steam engines, which had the same arrangement of induction and eduction pipes, and where the water was intercepted by a shelf so that the water was made to fall in the form of a broadly expanded or thin sheet, and, while thus falling, was acted upon by the ascending steam within the apparatus in the manner set forth in the patent."

This is offer No. 1 stated more precisely, and it has already been disposed of. It is but proper to add, however, that a draft of the machine (marked "D," M. J. Mitcheson, Commissioner, June 3d, 1871, and attached to the deposition of Mr. Birkenbine), was submitted to the court, at the time of the offer, and that it does not exhibit "the same arrangement of induction and eduction pipes." Nor is it improper to remind the defendant of Mr. Birkenbine's statement, that the machine

mentioned in the above offer is not suggestive of that patented by the plaintiff.

The seventh and last offer has already been disposed of in our general preliminary observation.

In his argument of the rule for a new trial, the defendant has submitted numerous legal propositions that are entirely true, but cannot be aligned with the facts of this cause. It is not necessary, therefore, to discuss principles of law; it will suffice to consider briefly, and in the order in which they appear upon the paper book, the applicability of those stated by the defendant to the facts comprehended in his several offers of evidence.

1. "The evidence tends to show that all of the patented apparatus, except the waste water pipe, had long been in use when the patent was applied for." But the patentee did not claim any one of the parts of the machine as his invention; he claimed a new arrangement of old parts—for this, letters patent are almost daily granted, and such grants if the arrangements be really new can be successfully assailed upon the ground of inutility only. This ground the defendant has not taken.

2. "It is immaterial for what purpose the prior machine was used. *Howe v. Abbott*, 2 Story, 190; *Bean v. Smallwood*, Id. 408; *Winan v. The Railroad Co.* Id. 412."

One cannot, by merely applying an old machine to a new use, claim a patent for the new application. However new and meritorious the application may be, it is not invention. But it cannot be contended that Hooten took the gas purifier, just as it was, and applied it to the new purpose of bringing exhaust steam into contact with water with the view of partially heating the latter. He was obliged to add a new part—an eduction pipe, and he entirely changed the arrangement of the parts; and defendant has not pretended to show that the new operation was not a resultant from the said addition and re-arrangement; or that the said addition and re-arrangement did not require inventive genius.

3. "The patent is invalid, if the patentee claims as new that which is old." *Holliday v. Rheen*, 6 H. 465.

The patentee claimed nothing but the *arrangement*.

4. "The allegation that the combination of the machine already in use with the waste water pipe makes the patent valid is untenable. The patentee claims more than this combination. The waste water pipe is an essential part of all heaters, and is universally known to be old."

The patentee did not claim the waste water pipe, nor the improvement of a machine *already in use*, by combining with it such a pipe.

5. "To be patentable there must be originality." *Hall v.*

Wiles, 2 Blatch. C. C. 194; *Crosby v. Lapouraille*, Taney's Decisions, 374.

If by originality is meant the quality of being substantially different from anything else, then "Hooten's Patent Heater" is, as to the arrangement of its parts, original. If by the term is meant such a difference as would require inventive genius to devise, then no offer of the defendant raised the question.

6 "A patentable change must be more than is suggested to a skilful workman by the operation of the machine; it is more than skill, it is the fruit of inventive genius." *Tatham v. Le Roy*, 2 Blatch. C. C. 474.

The letters patent were *prima facie* evidence that the change apparent in the plaintiff's machine was a patentable one; and the jury could not find the contrary without some evidence besides that of the prior existence of machines partially resembling the patented one.

7 "Where an entire combination is claimed, but to a certain point it has existed before, the patent is void, for it exceeds the invention." *Moody v. Fiske*, 2 Mason, 118.

That any part of plaintiff's arrangement existed before is not apparent in any of the defendant's offers, however liberally extended by construction.

8. "A combination is an entirety; if one of the elements claimed be given up, the patentee has no valid claim to the residue." *Vance v. Campbell*, 1 Bl. 427.

The plaintiff does not ask to give up any of the component parts of his combination; and the defendant has failed to indicate that any one of them had ever before appeared in an arrangement substantially identical with that of the plaintiff.

Though the counsel for the defendant has exhibited much industry in preparing for, and much ingenuity in conducting, the argument for a new trial, he has failed to convince us that his several propositions of evidence went further than to show the prior existence of machines, some resembling the machine in question in its component parts, some identical with it in the use to which it was applied, and one very similar to it in its general operation. Holding these propositions insufficient for the reasons heretofore indicated, the rule for a new trial is discharged.

John H. Sloan and John Goforth, Esqs., for plaintiff.

Wm. H. Yerkes, Esq., for defendant.

Orphans' Court, Philadelphia County.

COBURN'S ESTATE.

Commissions of 5 per cent. allowed to executors on personalty; 2½ per cent. on securities invested by the testator in his lifetime and not changed; 3 per cent. for rents collected by agents who had been paid 5 per cent. for collecting; and 3 per cent. for real estate, the title of which had been passed by them.

Sur exceptions to auditor's report upon the account of the executors.

A short summary of facts shows that the account covers over four years' time, from February, 1867, to April, 1871.

The inventory of personalty was appraised at \$100,411.81. There belonged to testator, at his death, thirty-five several parcels of real estate, all of which were sold and conveyed by the executors under the power and direction contained in the will, yielding \$127,600. The rents of realty collected, amounted altogether to \$27,686.26, the income from personalty and increase over inventory valuation, amounted to \$51,569.03. Aggregate of debits as against accountant, \$307,249.10.

The accountants claim a credit of \$8,980.95, being 5 per cent. commission on \$178,618.00, personalty, and \$3,828, being 3 per cent. on \$127,600 realty.

This claim was objected to on behalf of certain heirs, upon the ground that the estate was an exceedingly easy one to manage. That the executors had been put to very little trouble. There had been no suits by or against the estate. That of the personalty, \$96,860.21 came into the hands of accountants in the shape of investments made by decedent in U. S. bonds, &c., of this sum not a cent had been changed by the accountants or any of it invested by them, but the whole was composed of the same securities as in testator's lifetime. There was, therefore, no trouble, but merely responsibility.

From this it was argued that 5 per cent. was too high a rate of commission, and that accountants' commission upon this should be fixed at 2½ per cent.; in support of this view the following cases were cited: *Stevenson's Appeal*, 4 Wh. 98; *Barton's Est.* 1 Parsons, 29; *Walker's Est.* 9 S. & R. 223; *Pusey v. Clemson*, 9 S. & R. 209; *Duval's Estate*, 2 Wr. 119.

"That of the balance of the personalty, \$27,608.36, were collected by Martin & Sons, agents, to whom 5 per cent. was paid by executors upon this sum for collecting the same. Upon this amount, therefore, it having already borne a charge of 5 per cent., the executors should only have 2½ per cent.; that even the latter allowance would cause the estate to pay 7½ per cent., and the allowance of the full amount of percentage claimed by accountants would entail upon the estate the unprecedented

commission of 10 per cent. On the balance of the personalty 3 per cent. should be allowed." (*Pusey v. Clemson*, and *Walker's Estate*, quoted.) With regard to the commission of 3 per cent. on \$127,600, realty, exception was taken "because \$104,900 of it was sold within three months in large sums and with little trouble, and that therefore, 2½ per cent. should be allowed." (*Skinner's Est.* 17 Leg. Int. 381, cited.) "The balance of the realty (value, \$22,700) was put up for sale at auction and not bringing the price expected, and by virtue of a previous arrangement in case of such a contingency, was bid in by the legatees, and the executors made deeds to them for it. There was no money paid and no sale, but merely a passing of the naked title vested in the executors to the legatees for a nominal consideration." From this it was contended that not only was a commission of 3 per cent. on this sum too high, but that none whatever should be allowed.

It was argued on behalf of the accountants in reply, "that, as a general rule, 5 per cent. is allowed to executors and administrators unless the estate is large," and the following authorities were cited in support of this view: *Gables' & Jones' Appeal*, 12 C. 395; *Pusey v. Clemson*, 9 S. & R. 209; *Askeu v. Odenheimer*, 1 Bald, 380; *McFarland's Estate*, 4 Barr, 149; *Heckert's Appeal*, 12 Harris, 486; and 1 Ashmead, 318.

"That as to the securities, there were \$90,000; the care of these required great vigilance and fidelity at all times, and a watchful foresight to determine whether a sale was necessary." That "there was a trust, and the estate was carefully guarded during these four years, and managed with skill by the executors." No fees were paid to counsel, no large balance was kept on hand, but the funds were immediately re-invested causing large increase in the income of the estate. Moreover, commissions were not taken when due, as per *Walker's Estate*, 9 S. & R. 223, but were left until the last to swell the general fund. That as to the amount of rents returned by Martin & Sons, they could not have been collected so well unless an agent had been employed. That as to the item of 3 per cent. on \$104,900 sales of real estate, this covered thirty-five different properties, the executors had sold all but one, and for the trouble attending so many sales, 3 per cent. was not too much. That as to the charge of 3 per cent. on \$22,700 for sale of properties to the legatees, this was a *bona fide* sale. Strangers might have bought. Title in the property could not have passed without a sale; Br. Dig. p. 282; and generally where a trustee is negligent or ignorant of his duties, commissions should be dealt with a sparing hand, but to faithful, diligent, and intelligent trustees a full compensation should be given." *Lowrie's Appeal*, 1 Grant, 373.

The auditor reported that the authorities "give no absolute, inflexible rule as to compensation by commissions, and there can only be deduced the following general principle, that in Pennsylvania, by common consent, 5 per cent. has been fixed upon as a reasonable commission to all trustees, executors and administrators on moneys passing through their hands, but that there may be exceptions depending on the circumstances of the case, where the amount of compensation must depend on 'the reason and conscience of the tribunal having jurisdiction of the trust.' "

The auditor reduced the commissions on the securities, \$96, 860.21, from 5 per cent. to 2½ per cent., citing in support of his view, *Stevenson's Appeal*, 4 Wh. 104, and *McCausland's Appeal*, 2 Wr. 470.

He also reduced the commissions on \$22,868.86, part of the personalty, to 3 per cent., because, 1st. This sum was rent collected by agents who had been paid 5 per cent. for collecting. 2d. *Duval's Est.* 2 Wr. 119, guided him in making the reduction.

The auditor allowed the commission of 5 per cent. on the balance of the personalty, \$56,183.74, under the usual 5 per cent. rule, and he disallowed the charge of 3 per cent. on \$22, 700, for sale of real estate, because no money was paid as a consideration for the sale.

Upon exceptions to the auditor's report and arguments thereon, November 20th, 1871, Paxson, J., on Saturday, December 2d, 1871, delivered an oral opinion, dismissing all the exceptions filed, save the one excepting to the auditor's disallowance of the charge of 3 per cent. for sale of real estate for \$22, 700, which exception was sustained.

Jos. B. Townsend, Esq., for accountants.

Lewis Waln Smith, Esq., for the heirs.

[*Legal Gazette*, Dec. 15, 1871, Vol. 3, p. 404.]

Court of Common Pleas, Philadelphia County.

MOONEY v. ROGERS.

1. The landlord and tenant act of Feb. 28th, 1865, does not require it to be shown that the defendant's term in the premises had terminated.

2. A simple claim of title though fortified by oath is not enough to divest the jurisdiction of the alderman in proceedings under said act; it must appear that such claim may be a defence.

Sur certiorari. Under the landlord and tenant act of 28th of February, 1865.

Opinion by FINLETTER, J. Delivered September 30th, 1871.

All the proceedings in this case are singularly perfect. There

is nothing upon which the fourth and fifth exceptions are based and they are overruled. The third exception, "that the record does not show that the defendant's term in said premises had terminated," is without merit, inasmuch as the act of Assembly neither expressly nor impliedly, requires that fact to be proved or stated in any part of the proceedings. And when it is considered that the whole proceedings and the act itself, is founded upon the fact that all knowledge of the commencement and ending of the term is lost, it is scarcely to be expected that any statement of the commencement, duration, or ending of the term should appear. Indeed, if it did, it would vitiate the whole proceedings, because it would contradict the initial fact, without which the jurisdiction would not attach. This exception is overruled.

The first and second exceptions are predicated upon the following affidavit, which is returned with the record:—

City and County of Philadelphia, ss. :

John C. Rogers, the defendant in the above case, being duly sworn according to law, deposes and says, that the title to the real estate, the subject of the proceedings in above case, will come in question in the trial of said case; that the title to the said real estate is claimed by deponent by virtue of a purchase of the same from one Samuel Duffy, who owned the same before said property came into deponent's possession, and also before the plaintiff ever claimed to own the same.

Wherever the title to real estate can come in question the jurisdiction of the alderman ceases. This must appear either in the facts of the case, or in the claim of title which is made before him. A simple claim of title, though fortified by oath, is not enough; it must appear that such claim may be a defence. *Heritage v. Wilfong*, 8 P. F. S. 140. It must therefore set out the facts which lead to the conclusion that the title may or can come in question, and the facts must be such as the defendant may be allowed to plead or prove. A tenant cannot dispute the landlord's title, nor can he set up an adverse title against it. 2 Binney, 473. He may, however, set up a title connected with the title of the lessor, and may show that the title of the lessor has been divested. *Newell v. Gibbs*, 1 Watts & Serg. 509, cited in *Heritage v. Wilfong*. It will be seen that the facts set out in the defendant's affidavit do not necessarily conflict with the lessor's title, nor does it appear how they annul the relationship of landlord and tenant. It does not appear from them how or in what manner the title to the land can come in question in these proceedings; and it is evident that the relationship of landlord and tenant being established they could not be a defence.

The proceedings show that even before the defendant set up

the claim of title, there was ample testimony that the relation of landlord and tenant existed. The finding of the alderman sets out that the plaintiff was the owner of the land; that the defendant was a tenant from year to year at a rent of fifty dollars per annum, and that he paid the rent of fifty dollars per annum to the plaintiff from June 29th, 1869, to January 1st, 1870. If, therefore, the facts of the defendant's affidavit would establish a title adverse to the lessor's title, he is precluded from pleading them, inasmuch as they do not bring him within any of the contingencies in which he may antagonize his landlord's title.

The exceptions are overruled and the judgment affirmed.

Court of Common Pleas, Philadelphia County.

NIPPES v. KIRK.

1. After a judgment entered by an alderman for \$14.43, and the payment to him of said amount and costs, he cannot afterwards open the judgment and rehear the cause upon the ground that there was a clerical error in entering it.
2. In proceedings for the collection of money, aldermen derive their whole authority from acts of Assembly; whatever is not therein contained for them to do, they are prohibited from doing.

Sur certiorari.

Opinion by FINLETTER, J. Delivered September 30th, 1871.

The record of the alderman recites: "And now, April 8th, at 3 p. m., plaintiff appears and claims \$14.43 * * * whereupon judgment publicly against the defendant for \$14.43. April 8th, defendant appears; same day transcript for defendant. April 27th, G. W. Wollaston paid \$14.43 and costs. May 25th, plaintiff takes a rule on defendant to show cause, if any he has, why the judgment entered in this case by mistake should not be opened and the error in the entry thereof corrected."

Against the protest of the defendant the alderman made this rule absolute; opened the judgment; heard the plaintiff anew and finally entered the judgment against the defendant for \$64.68. All this was done because the alderman alleges that the original entry of judgment for \$14.43, was a "clerical error." It is not easy to see from an inspection of the record how this entry could be a "clerical error," inasmuch as it therein appears that the plaintiff claimed only \$14.43. Again, if a clerical error, why was it not corrected, or at least noticed, when the transcript was given to the defendant, or when the defendant paid the judgment and entry thereof was made upon the record?

If there was neither legislative nor judicial prohibition, it must be apparent that after the judgment was paid the alderman could not legally act. The judgment, the cause, and the claim upon which they were founded, were extinguished, and the record remained only as an evidence so far as the defendant was concerned of that extinguishment.

The record of the alderman is the only evidence of his judgment, and is conclusive against him and the parties. Over it he has no discretionary power even to correct a clerical error when that would affect the rights of either party. He cannot meddle with or disturb a judgment entered by him except at the instance of the appellant, with the consent of the adverse party, and within twenty days after the rendition of the judgment; or at the instance of the defendant within thirty days, when judgment has been entered by default, upon satisfactory proof that he was absent when process was served, and did not return home before the return day of the process, or was prevented by sickness or other unavoidable cause from attending before the justice. *Russell v. Smith*, *Stockdale v. Campbell*, 1 Phil. 425 and 520.

In proceedings for the collection of money, aldermen derive their whole authority from acts of Assembly. *Gould v. Crawford*, 2 Barr, 90. Whatever is not therein contained for them to do, they are prohibited from doing. Nothing is left to discretion or surmise.

Judgment reversed.

Court of Common Pleas, Philadelphia County.

HOPKINS v. McCLELLAND.

Under the landlord and tenant act of April 3d, 1830, where the requisite notice to quit is not given, and a person not the lessor makes the oath, all the subsequent proceedings are irregular.

Sur certiorari. Proceedings under the landlord and tenant act of April 3d, 1830.

Opinion by FINLETTER, J. Delivered September 30th, 1871.

In order to give the alderman jurisdiction it should appear to him that fifteen days' notice to quit the premises had been given to the lessee; and the oath and complaint should be made by the lessor.

In these proceedings but ten days' notice was given, and the oath and complaint were made by a stranger to the lease, and in his own behalf. Therefore all subsequent proceedings were irregular.

Judgment reversed.

Court of Common Pleas, Philadelphia County.

ERETY v. WILTBANK.

1. If in the complaint under the landlord and tenant act of March 25th, 1825, any of the necessary requirements of the act are wanting, aldermen are without authority to act.
2. In all proceedings before aldermen it must appear that the judgment is founded upon properly received testimony or evidence. The facts given in evidence need not be set out upon the record.

Landlord and tenant. Sur proceedings to obtain possession under the landlord and tenant act of March 25th, 1825.

Opinion by FINLETTER, J. Delivered September 30th, 1871.

To give the aldermen jurisdiction the complaint should set forth a demise from the plaintiff to the defendant for a term of years, at a specified rent, of premises situate in the city or county of Philadelphia. That the tenant has removed therefrom without leaving sufficient property thereon to secure the payment of at least three months' rent, and has refused to give security for the payment thereof in five days, after demand of the lessor, and has refused to deliver up possession; and should be made and sworn or affirmed to by the lessor. If in any of these respects the complaint is wanting, the aldermen are without authority to act, and their further proceedings are irregular. The complaint is only authority for the aldermen to proceed and will serve no other purpose. The summons must be duly issued and served, and when the parties regularly appear, the alderman must find from sufficient evidence all the facts necessary. This finding should appear upon the record. It is not enough to say, "we, the aldermen, find the above complaint is in all respects just and true," "unless the facts are recited in the complaint with particularity, such as the conditions of the demise, both as to length of term and amount of rent to be paid; the time when the tenant removed from the premises; that he did not leave property to secure payment of three months' rent, or a refusal to give up possession after a demand had been made for the surrender of the premises." In the absence of a particular statement of the material facts being set out in the complaint, they must be recited in the finding of the justices. 6 Phila. R. 182.

In all proceedings before aldermen it must appear that the judgment is founded upon properly received testimony or evidence; that is, that witnesses were sworn and gave evidence on behalf of either party, or that written testimony was duly offered and read. The facts given in evidence need not be set

out upon the record ; any attempt to do so might be fatal, inasmuch as it would be presumed that the judgment had been entered alone on the facts set out. *Gaissenberger v. Cerf*, 1 Phil. 17 ; *Mund v. Vanfleet*, 2 Phil. 41 ; *Connelly v. Arundel*, 6 Phil. 49 ; *Uber v. Hickman*, 6 Phil. 132. In nearly all the requirements these proceedings are defective.

Judgment reversed.

Court of Common Pleas, Philadelphia County.

ZEIGENFUSS et al. v. STIER.

A scire facias quare executionem non issued in 1871, by an alderman upon a judgment obtained in 1857, is irregular.

Sur certiorari.

Opinion by FINLETTER, J. Delivered September 30th, 1871.

On the 18th day of March, 1857, the plaintiff obtained judgment before Alderman Beitler. On the 22d day of June, 1871, Alderman Carpenter issued a *scire facias quare executionem non*. Upon the return thereof, the defendant not appearing, the alderman heard the plaintiff and entered "judgment by default publicly for plaintiffs for \$65.75, and costs of suit."

This was irregular. The only judgment that he could have rendered in pursuance of the summons was, that the plaintiffs should or should not, *might or might not* have execution. Even such a judgment would have been irregular, as the act of Assembly expressly provides "that no execution shall be issued on a judgment rendered before a justice of the peace or alderman after five years from the rendition of such judgment, unless the same shall have been revived by *scire facias* or amicable confession." Purdon's Digest, p. 60, pl. 78.

Judgment reversed.

Court of Common Pleas, Philadelphia County.

CLARK v. BARTLETT.

In all actions for the recovery of penalties the jurisdiction of the alderman, cause of action, etc., should appear upon the record.

Sur certiorari. Action for recovery of penalty for violation of harbor regulations.

Opinion by FINLETTER, J. Delivered September 30th, 1871.

In all actions for the recovery of penalties the jurisdiction of the alderman should appear upon the record, and the cause of action and judgment should be so specifically set out, that they would when pleaded be a sufficient protection in any subsequent suit for the same cause of action. The record should show in what respect the law has been violated; that all the proceedings conform to the law; that the charge is sustained by the testimony of duly qualified witnesses or by the confession of the defendant; and that the judgment was duly entered. *Commonwealth v. Feigle*, 2 Phil. R. 215; *City v. Duncan*, 4 Phil. R. 145. In all these respects the proceedings in this case are wanting.

Judgment reversed.

Court of Common Pleas, Philadelphia County.

SHOURDS v. WAY.

A return of personal service of a summons, which does not show that the original summons was produced to the defendant, is insufficient.

Sur certiorari. Proceedings under the landlord and tenant act of 1863.

Opinion by FINLETTER, J. Delivered September 30th, 1871.

The service in this case was "by leaving a correct copy of the within summons upon the premises therein described being the dwelling house of the therein named lessee or tenant with herself personally." This, if anything, is personal service. The act of Assembly expressly requires in the case of personal service that the original summons should be produced to the defendant. In *Buchanan v. Specht*, 1 Phila. R. 252, Judge King says, "Unless the officer making such service produce the writ *his acts are null and void*, for without the production of the writ a defendant is not bound to know, nor can he know, that the officer has such writ in his possession."

Judgment reversed for insufficiency of the return.

Court of Common Pleas, Philadelphia County.

IN EQUITY.

HARMSTEAD v. WASHINGTON FIRE COMPANY et al.

1. An honorary member of a fire company, whose membership has never been declared forfeited by the proper authority and in the proper manner, is entitled to all the privileges of honorary members, even though there has been a non-user by him of such privileges for the space of twenty-nine years.
2. His temporary membership in another company, though prohibited by a by-law of the original company, will not affect his rights where such violation of the by-law is acquiesced in by the company.
3. The statute of limitations has no bearing upon his non-user of his privileges.

Sur application for injunction.

Opinion by FINLETTER, J. Delivered December 16th, 1871.

The plaintiff avers that he was an active member of the company from 1822 to 1827, when he was placed upon the roll of honorary members, and as such "is entitled to receive a due proportion of the property and effects of said company upon the winding up of its affairs."

That the defendants intend to wind up the affairs of the company, and divide the effects among the members, and threaten to exclude him from participation therein.

"The prayer of the bill is:

1st. That defendants be restrained from distributing the funds of the company among its members, to the exclusion of the plaintiff's right to participate therein.

2d. That the plaintiff may be decreed to be entitled to a proportionate part of said funds and property."

The company was instituted January 8d, 1796, and incorporated June 17th, 1841. The constitution and by-laws were revised in 1856. By article seventeen, section first, it is provided that "honorary members shall have the same privileges as other members, but, in accepting an office or appointment, they shall be as liable for fines for non-attendance, as if they were active members." Section second, "any member who may join any other company shall forfeit his rights of membership." The same provisions are substantially contained in article fifteen, section first of the constitution and by-laws published in 1838.

By article sixteen of the constitution of 1838, and article nineteen of that of 1856, it is provided that, "no member shall be elected or expelled without the concurrence of two-thirds of those present at a stated meeting; no member shall

be expelled without having an opportunity to defend himself."

The defendants admit the honorary membership of the plaintiff up to 1833. It is not pretended that at any time he was duly expelled under either of the above provisions, or by the action of the company under any pretence.

They allege that his membership was determined:

1. By reason of his having joined another company.
2. By not participating in the affairs of the company for more than twenty-nine years.

The plaintiff in his affidavit admits that he did join another company in 1830, and continued a member thereof, for six months, but that he did this in the interest of the company defendant, and that there was then no provision which made this a forfeiture of membership. This statement is verified to a certain extent by the testimony of W. W. Weeks, a witness for the defendants. He says: "Harmstead left the said company about the end of the year 1833." He must, therefore, have been recognized as a member of the said company not only during his connection with the Hope Company, but for more than two years afterwards. It would follow from this, that his membership of the Hope Company either was not in violation of any duty he owed to the Washington Company, or was with their consent and acquiescence.

Even if the provision was in full force, the action of the company with notice to him was necessary to make it effective against his rights. The forfeiture of membership must be declared by the proper authority, and in the proper manner, otherwise it is without force or effect.

When life or limb, or rights of any kind are declared to be forfeited by the law for an act of omission or commission, the forfeiture is ascertained and declared by the judgment of a proper tribunal.

If we were satisfied that the plaintiff had done anything to forfeit his rights we might refuse to interfere in his behalf. In a proper case this would be done. But it is evident upon their own showing that the defendants have acquiesced in this alleged violation of one of their rules, for nearly thirty years, and it is too late for them now to ask us to interpose it between the plaintiff and his equitable rights.

The plaintiff lost none of his rights by not asserting them by his attendance at and in the affairs of the company. This was not required by his duties and obligations as an honorary member; and he would cease to be such only by resignation or proper expulsion.

It has been argued by the defendants, that the statute of limitations is recognized in equity as in suits at law. This

principle may not be questioned, but it is difficult to see its application to the present case. If it be intended to apply to the plaintiff's non-user of his rights for twenty-nine years, then the argument fails, because his rights as an honorary member were not dependent upon their exercise or assertion; and they were not of such a character as that they could be exercised by another adversely. If, however, it be intended to apply to the acts of the company against his rights of membership it might be effective. It may very well be conceded that an acquiescence by the plaintiff in even an illegal expulsion for twenty-nine years would bar his right to redress in any court. There is, however, no evidence that the defendants ever asserted to him in any way his forfeiture of membership, until they were prepared in August last to divide the assets of the company.

The injunction as prayed for is allowed.

H. R. Warriner, Esq., for plaintiff.

Moses Dropsie, Esq., for defendant.

Court of Common Pleas, Philadelphia County.

IN EQUITY.

FREIBERG et al. v. THE RELIANCE FIRE COMPANY et al.

A fire company having passed a resolution prohibiting any further payment of dues by contributing members, cannot afterwards expel such contributing members for not paying or not tendering payment of dues.

Sur application for perpetual injunction.

Opinion by FINLETTER, J. Delivered December 16th, 1871.

The complainants aver, that they are contributing members in good standing, of the company defendant; that the company are owners of certain property which the defendants are about to divide among themselves, and have refused to pay or transfer to the complainants their share of the same.

The defendants deny that the plaintiffs are contributing members in good standing. "They admit that all of them were contributing members of the said company, but that their membership ceased by reason of their not paying their dues to entitle them to membership." "They aver that said contributing membership was but a quasi membership;" "that in accordance with immemorial usage in the company, of which said complainants had full notice, on the third day of August last past all their names were dropped from the contributing roll, because they had not paid their contributions, due on the first day of July

next preceding; that neither of said complainants paid, or tendered the amount due by them as aforesaid, either at the time, or at any other time."

Article fourteen, section first, of the constitution of the company, provides, that contributing members shall have all the privileges of active members except being eligible to office.

If it be conceded that, "in accordance with immemorial usage in the company," the names of the complainants could be legally "dropped from the contributing roll," it should be shown at least that this was done by the company in a regular manner, at a proper time and place, and upon notice to the complainants. None of these requisites are shown. It does not appear in any way, "that the names were dropped from the contributing roll" by any one having authority.

If, however, every requirement had been complied with, it would have been an illegal disfranchisement of the contributing members. The company, on the 1st day of January, 1871, passed a resolution prohibiting any further payment of dues by contributing members. Thereafter, no dues were to be paid; now, the company having by its own act made it impossible for contributing members to pay, they must be regarded as having paid, and could not be expelled for not paying, or not tendering payment.

The injunction is made perpetual.

J. W. M. Newlin, Esq., for plaintiffs.

J. Alexander Simpson, Esq., for the company.

Court of Common Pleas, Philadelphia County.

IN EQUITY.

BRADY et al v. SHISSLER.

1. A demurrer to a bill in equity stated that the bill contained several distinct matters not necessarily connected with each other, and that by joining the same, the defendant owing to the prolixity of the proceedings consequent thereon, would be put to unnecessary charges and expenses.
2. *The court held* that the said matters all arose out of and were dependent upon a contract made by defendant with the plaintiffs, and were properly joined. Demurrer overruled.

Sur demurrer to bill.

Opinion by FINLETTER, J. Delivered December 16th, 1871.

The plaintiffs have averred in their bill, that the defendant being the owner of certain real estate entered into an agreement with Peter F. Stout, and Edward Brady, to give them the con-

trol of said property for sale in lots of such sizes and prices as they may fix, and upon defined terms. He reserved a certain price for the land, and one-third of the amount the land sold for above that sum. The plaintiffs, Stout and Brady, were entitled to receive the other two-thirds of said surplus. He further agreed to execute deeds to the respective buyers of the lots in conformity with the agreement.

Stout and Brady entered upon the performance of the contract, and expended in advertising the scheme about \$426. The land was divided into 211 lots; seventy-one of which were sold for cash, at an average joint profit of about \$99, "and the whole of all the remaining lots unsold, 140, have become known in the market and are now much enhanced in value."

In pursuance of the agreement, Stout and Brady in the name of the defendant, executed an agreement of sale to Joseph H. Moore, for lot No. 34, upon the plan of said property, and tendered a deed of the same to Shissler for execution. This he refused, and notified them "not to make any further sales of the rest of said lots, and that he will not execute any more deeds for the same."

To this bill the defendant has demurred as follows, viz. :—

The defendant, by protestation, not confessing or acknowledging any of the matters and things, &c., demurs to the whole bill, and assigns the following reasons, viz. :

"The bill is exhibited by the said plaintiffs against the said defendant for several distinct matters and causes not necessarily connected with each other, and, by thus joining the same, not dependent on each other, the proceedings in the progress of the said suit will be intricate and prolix, and this defendant put to unnecessary charges and expenses in matters therein. Wherefore, for these and other good causes of demurrer appearing in the said bill, this defendant does now demur to the said bill, and to all the matters and things therein contained, and prays the judgment of this honorable court, whether he shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

(Signed) ISAAC M. SHISSLER."

In point of fact, it is not true, as the demurrer alleges, that "the proceedings in progress of said suit, will be intricate and prolix, and the defendant put to unnecessary charges and expenses." On the contrary, if the several matters arising out of his contracts and set out in the bill can be properly determined in this suit, it will be much to his advantage "in charges and expenses" and litigations.

All the matter charged in this bill arise out of and are de-

pendent upon the defendant's contract with Stout and Brady. The contract with Moon is one of the fruits of that contract, and must be considered as a part thereof. It has no vitality in itself, and perishes when separated from its parent stock. It follows from this that in common with Stout and Brady, he has an interest in their contract with the defendant. Again, so far as the defendant is concerned, Stout and Brady have an interest with Moon in the execution of his contract, viz.: two-thirds of the surplus above the price of the land. Therefore all the plaintiffs having an interest in common in all the subject matters of the bill, the enforcement of the defendant's contracts, as against the defendant, the suit is well brought.

The demurrer is overruled.

George S. Selden, Esq., for plaintiff.

Aaron Thompson, Esq., for defendant.

[I am indebted for the preceding ten opinions to Judge Finletter. They were received too late for publication in the regular issues of the Legal Gazette.—EDITOR.]

Court of Common Pleas, Philadelphia County.

CITY v. VANDEVIER.

1. The act of 23d March, 1866, provides with great particularity, that before judgment by default shall be taken, notice of the claim and proceedings shall be given to the owner.
2. The phrases "municipal claims," "any claims in the name of the city of every kind," clearly include claims for taxes.
3. No proof of notice to the owner, appearing in the proceedings, a judgment upon a city claim for taxes is void.

Opinion by FINLETTER, J. Delivered December 23d, 1871.

This is a rule to strike off a judgment, which was entered December 7th, 1867, for want of an affidavit of defence, for \$22.05. Upon this judgment the real estate was sold for \$, and two years having passed, the title to the property, worth fifty times the claim, is confirmed, if this judgment be sound.

The act of 23d of March, 1866, under which the suit was brought, provides that "before any judgment by default shall be entered therein, the court shall be satisfied by an affidavit to be filed of record of the following facts." It is not necessary here to set out the facts. They have a relation, however, with great particularity to one single object, viz., notice to the owner of the claim and proceedings.

It is admitted that the notice required by the act was not in any way given. Indeed, it is boldly contended that the plain-

tiff was not required to give such notice. The argument is that the act imposes that duty only upon the city solicitor; that the solicitor for the receiver of taxes is authorized by law to collect these taxes, and it is not made his duty in terms to give notice, and therefore he may proceed to collect under the act without notice; that the act does not apply to the collection of taxes; that for ten years no notice has been given, and the titles to all the properties sold for taxes during that period will be called in question.

The act especially requires notice to be given; of which proof must be filed of record before the court is authorized to enter judgment. If this be not the duty of the solicitor of the receiver of taxes, he is excused for not performing it, but that does not strike the provision from the act, nor does it authorize us to disregard it.

In fixing the claims which are the subjects of the act, the following terms, are used: "municipal claims of every description," "any claim in the name of the city of every kind;" "this act shall apply to all claims and liens filed and to be filed in the name of the city, whether to use or otherwise." Surely these include taxes, the most important of all "municipal claims."

If for ten years the property of citizens has been taken away from them for such small claims against the express terms of the act, it is a sad commentary upon the administration of the law. It is, however, the best of all reasons that such a condition of things should cease now and forever. To sell a man's property by semblance and form of law, without notice of any kind, is confiscation.

In the present case it is alleged that the title to the property sold under the judgment, has been made the subject of judicial action in the District Court; and therefore as that court is competent to settle the controversy we should not interpose. We have great respect for that court, and if it had the right to decide the question now before us, and had taken jurisdiction, we would doubtless repose upon its action. But it has no right to decide the question which is now raised; and if it had it would still remain equally our duty to do so.

We are asked to pass upon the validity of a judgment entered in our court, and no matter what other courts may have, or may assume to have the right to do this, we cannot avoid it.

It is alleged that Mrs. Vandevier, the owner of the property at the time judgment was entered, attorned to the purchaser under this judgment, and therefore she and her grantees are precluded from contesting the judgment. Her attornment simply precluded her as tenant from contesting the purchaser's position as landlord. Even as tenant she might have shown that the

contract of tenancy was entered into in fraud or mistake. But the disability arising from the tenancy ceased when the tenancy expired.

How could her agreement to become a tenant give us a jurisdiction we otherwise would not have; or how could it make a judgment good and valid which theretofore was without doubt void?

It is not, however, necessary for us to decide at this time how far she or her grantee is affected by her alleged agreement. It becomes the duty of a court to correct an error appearing upon the face of its record and proceedings whenever the attention of the court is called to that error, whether by a party in interest or not. In this case the act of Assembly requires that the proof of the notice shall appear in the proceedings before judgment can be entered. No such proof appears of record; and it is admitted, no notice as required by the act was given; the judgment is therefore void.

The rule is made absolute.

[Legal Gazette, Dec. 29, 1871, Vol. 3, p. 422.]

Court of Common Pleas, Philadelphia County.

HUSTON v. DONNELLY.

A judgment upon a *scire facias* before an alderman having jurisdiction of the original cause of action, is not beyond his jurisdiction though entered for more than one hundred dollars.

Opinion by FINLETTER, J. Delivered December 23d, 1871.

A *scire facias* was issued in this case by Alderman Clarke, August 23d, 1871, upon a judgment obtained before Jos. G. Miller, late one of the aldermen for the city of Philadelphia. The transcript shows that the plaintiff claimed \$175, and that judgment was entered for \$168.14, September 5th, 1871. An execution was issued September 26th, 1871, and returned *nulla bona* October 4th. A transcript was entered in this court November 25th, and execution was issued, which was returned "levied and condemned" December 9th; rule entered to strike off proceedings and judgment and why proceedings should not be arrested."

The cause shown is that the proceedings of the alderman are *coram non judice* and void, judgment having been entered by him for \$168.14; no objection is made in any other respect. If the position of the defendant be well grounded, he is not prejudiced by his delay, as want of jurisdiction can be pleaded at any stage of the cause.

It does not appear from the record, nor was it stated in argument for what precise sum the judgment before Alderman Miller was entered. We have, however, the time, and from this and other *data* we have arrived at the conclusion that the original judgment was for a less sum than \$100.

A *scire facias* is no more than a judicial writ which lies only where the record remains. It is not a new suit, but a continuation of an old one. The judgment on it is not with us as in England, a bare award of an execution, but a judgment *quod recuperet*, on which an execution commonly issues as on an original one. This change of practice does not change the nature of the process. *Dougherty's Estate*, 9 W. & S. 195. In 1 Binney, 62, it was held to be the proper course to include the interest in the judgment upon a *scire facias*, and that course has been recognized and pursued ever since.

It would follow from this that a judgment upon a *scire facias*, before an alderman having jurisdiction of the original cause of action, is not beyond his jurisdiction though entered for more than \$100.

Rule discharged.

[Legal Gazette, Dec. 29, 1871, Vol. 3, p. 423.]

Supreme Court of Pennsylvania.

CITY OF PHILADELPHIA v. WELLER.

The city of Philadelphia and the passenger railway companies are both liable in damages for neglect to repair the streets over which the railway tracks are laid.

Error to District Court of Philadelphia.

This was an action on the case brought by Christiana Weller, widow of Martin Weller, deceased, against the City of Philadelphia, to recover damages for the loss of the life of plaintiff's husband, caused in the following manner: On the 18th day of September, 1861, there was a hole between the tracks of the Richmond and Schuylkill Passenger Railway Company on Girard avenue, between Front and Howard streets, and the deceased, while driving a beer wagon on the tracks of the railway company, was pitched from his seat by a jar, caused by the front wheel of the wagon getting into the hole, and from this accident, death ensued.

The narr. averred, that it was the duty of the defendants (The City of Philadelphia) to keep Girard avenue in good and sufficient order and repair, and that they did not regard their duty, but neglected the same.

Girard avenue was occupied by "The Richmond and Schuyl-

kill Passenger Railway Company," a body politic, incorporated by act of Assembly approved March 26th, 1859; section six of which act is in the following words: "That the said company shall be subject to the provisions of all ordinances heretofore, or that may be hereafter passed, by the councils of the City of Philadelphia, regulating city passenger railways in said city," and by an ordinance in force at the time the act took effect, entitled "An ordinance to regulate passenger railways," approved July 7th, 1857, it is provided, "that all railroad companies shall be at the entire cost and expense of maintaining, paving, repairing, and repaving, that may be necessary upon any road, street, avenue, or alley, occupied by them."

On the trial of the cause in the court below, before Hare, J., the counsel for defendants requested an affirmative charge on five points, *inter alia*.

1st. "If the deceased was killed by reason of the *non-repair* of Girard avenue, the Richmond and Schuylkill Passenger Railway are liable primarily.

5th. "The defendants are not liable, and the verdict should be in their favor."

The learned judge declined to charge, as requested on these points, but instructed the jury that the obligation of the city to keep its highways in good order is primary to the citizen, and that the liability of the railway company, is not exclusive.

To which the defendants excepted.

The verdict was for the plaintiff for \$500.

The defendants took a writ of error, and assigned for error, that the court below erred in not charging, as the counsel for defendants requested, in his first and fifth points.

David W. Sellers, Esq., and *Hon. F. Carroll Brewster*, for plaintiffs in error, argued that even should it be conceded, that it is the duty of the City of Philadelphia to keep the highways within her limits in repair, still, the effect of the charter of the railway company is to relieve the city from its primary duty, and impose it upon the holder of the franchise, so far as Girard avenue is occupied by it. *Philadelphia v. Lombard and South Streets P. R. R. Co.*, 8 Grant, 403; *Commonwealth v. Phillips*, 8 Wright, 198; *Borough of West Chester v. Apple*, 11 Casey, 284; *General Ordinances Relative to Passenger Railways*, July 7th, 1857; April 1st, 1859; October 16th, 1860, and October 5th, 1863.

Robert D. Coxe, and *M. J. Mitcheson, Esqs.*, for defendants in error, argued, that it is the primary duty of the city to repair the streets, and it is liable for damages caused by the non-repair. Act of June 13th, 1836, § 6, P. L. 556; *Dean v. Milford*, 5 W. & S. 545; *Commissioners of Kensington v. Wood*, 10 Barr, 93; *Erie v. Schwingle*, 10 Harris, 384; *Alcorn v. City*, 8

Wright, 348; *Elliott v. Concord*, 7 Foster, 204; *Tucker v. Russel*, 14 Pickering, 279; *Bally v. Duxbury*, 24 Vermont, 155; *Currier v. Lowell*, 16 Pickering, 170.

The opinion of the court was delivered March 5th, 1866, by WOODWARD, C. J.

Per Curiam. The city has no reason to complain of the rulings of the learned judge. It is not worth debating, whether, under the acts of Assembly and the city ordinances, the primary duty to keep the streets in repair is upon the city, or the railway company, for both are liable in damages to a citizen injured by neglect to repair, and he may recover against whichever party he sues. As to liabilities between the city and the railway company, no question is raised upon the record, and, therefore, nothing is to be said.

We think it would have been error to charge as requested in the fifth point.

The judgment is affirmed.

[Legal Gazette, Dec. 22, 1871, Vol. 3, p. 424.]

Court of Common Pleas, Philadelphia County.

IN EQUITY.

CITY SEWERAGE UTILIZATION CO. v. BOARD OF HEALTH.

1. The acts of Assembly incorporating the City Sewerage Utilization Company, require that the Board of Health of the city of Philadelphia, or other proper authority having the right to make contracts for street cleaning, *shall* enter into such contracts with that company.
2. Cleaning the streets of the city is not "a public work erected or in progress of erection" in the contemplation of the act of Assembly of April 8th, 1846, forbidding courts to interfere by injunction with the erection or use of such public works.
3. The wording of the second section of the act of April 9th, 1870, concerning said company is mandatory, the word *shall* is not to be construed to mean *may*, and the whole act is clearly within the scope of legislative authority.
4. The act incorporating said company is not contrary to the clause of the State constitution, which directs that the Legislature shall pass no bill containing more than one subject.
5. Injunction enjoining the Board of Health from making any contract for street cleaning except with said company, continued.

Opinion by ALLISON, P. J. Delivered December 12th, 1871.

The plaintiffs ask that defendants, who constitute the Board of Health of the city of Philadelphia, be enjoined from awarding, or making, or entering into any contract for cleaning the streets of Philadelphia, and removing the ashes therefrom, to any person or persons other than the plaintiffs. The first prayer of the bill amounts to no more than a request that we express an opinion that it is the duty of the Board of Health to con-

tract with the plaintiffs upon the terms named in the charter of the company, and the supplement thereto.

The act of May 9th, 1869, is entitled "An act to incorporate the City Sewerage Utilization Company," and the act of April 9th, 1870, is entitled "A supplement to the original law," reciting in full the title of the first act. The first section of the supplement provides that the Board of Health, or other proper authority having the right to make contracts for street cleaning, *shall* enter into a contract with the plaintiffs to clean the streets of the city for a period of not less than ten years, at a rate which is \$16,000 per year less than the contract price then in force, for the first two years; for the second two years, \$26,000 per year less; for the third two years, \$36,000 per year less; for the fourth two years, \$46,000 per year less, and for the fifth two years, \$66,000 per year less—making a saving to the city in this respect alone, for the term of ten years, of \$380,000.

The defendants object to the injunction for which plaintiffs pray upon several grounds. The first point stated by them in their printed brief of argument is, that this court does not possess the power to grant the relief which the plaintiffs ask us to give them because of the restriction which the act of April 8th, 1846, places on the exercise of such power by the courts of the city of Philadelphia. This act is imperative upon us in a case which properly falls within its letter, or within its true intent and meaning. The command is no such court *shall* grant or continue injunctions against the erection or use of any public work of any kind, erected or in progress of erection, under the authority of an act of the Legislature, till the question of title and damages has been settled by a court of law. The binding effect of this law has recently been recognized in the cases of *Windrim v. The City*, in the matter of the repair of Girard avenue bridge, and in *Wheeler v. Rice*, in a bill filed to restrain the erection of public buildings at Broad and Market streets, and in *Wolbert v. The City*, 12 Wright, 439, the Supreme Court held that the plaintiff was "barred out" of a court of equity by the act of April 8th, 1846, in an effort to restrain the commissioners of Fairmount Park from taking from him a right of way, which he claimed over lands taken by the commissioners, because he had not first settled his right in a court of law.

This decision carries the application of this act to its utmost limit, and yet there is a sense in which to lay out and establish a public park may be held to be an erection or construction: to construct a thing is to put together its several parts in their proper place and order, and to erect is to found and form, as well as to build or raise and set up. A park is made up in part of walks and roads, which are new constructions, and of ornamentation, with shrubbery and trees, which are set up in the

places in which they are planted; and of booths and summer houses, which are erected or built. But we are unable to say as much of the cleaning of the streets of the city; this is a work into which the elements of erection or construction do not in our judgment enter, and we are therefore unable to agree with the defendants that the plaintiffs are at this stage of the clause, and for this reason, "barred out" of equity by the act of 1846.

The second point of objection is, that the legislation on which plaintiffs rely is not mandatory upon the defendants; that it is not free from doubt, to say the least of it, whether it was intended to command the defendants to contract with plaintiffs upon the terms set forth in the act.

The wording of the second section of the supplement is, the Board of Health, or other proper authority having the right to make contracts for cleaning the streets and removing the ashes therefrom, *shall* enter into an agreement and contract with the City Sewerage Utilization Company, for a period of not less than ten years. And as the power to perform this kind of public service was by the act of March 18th, 1869, placed exclusively in the hands of the Board of Health, where it still remains, there is, upon this statement of the facts, proper authority to make contracts for cleaning the highways of the city and removing fecal matter other than the Board of Health, nor has the contrary been asserted. There is no room therefore for doubt upon this point. But is there room for question that the direction to the defendants is obligatory upon them, or is it possible to hold that in the connection in which it is used, the word *shall* can be made to read *may*, so that the sentence would run, *may enter into a contract*? This latitude of construction is allowable when it is absolutely necessary to prevent irreparable mischief, or to construe a direction to that it shall not interfere with vested rights, or conflict with the proper exercise of power, by either of the fundamental branches of government. This was done in a late case of great gravity, in an able opinion delivered by my brother Ludlow, which, as *Stevenson's Appeal*, was afterwards affirmed by the Supreme Court; but we do not see in this act that which would justify us in interpolating into the supplement to the charter of the plaintiffs' language which it does not contain, and which we think would do violence to the intent and meaning of the act, and which, in our opinion, is clearly within the scope of legislative authority, even though it be conceded that it is unusual in its term. The powers of the Legislature being limited only by the restrictions upon it which are found in the Federal or State Constitutions, we are at a loss to understand in what respects either of these instruments is violated by the charter of the plaintiffs, and as the Board of Health is at least a *quasi* muni-

cipal corporation, its franchises and powers are subject to legislative control, whether it be by way of enlarging or abridging such powers; it is the creature of the Legislature and must go up or down at its command, having no vested right in any authority with which it has been clothed, so far as the performance of public and corporate duty is concerned, it would be a waste of time to cite authority in support of this elementary principle. It is no valid objection, therefore, to this law to say, that it is not common in its details, or that the Legislature, directing the Board of Health to contract in a matter relating to the general purpose for which it was established, and set out in detail the terms of such contract. Nor ought this to be questioned, when the interest of the public is upon the face of the direction concerned to the extent of \$380,000, and incidentally to a much larger amount, as it appears to us must be the result if the law is fairly carried into effect.

The third reason assigned against granting relief to the plaintiffs is that the contract is not capable of being carried fully and literally into effect.

The contract is to run for ten years at least, and the act gives to the city the option of purchasing the franchises of the company at any time after the year 1880. There may arise a question as to the time at which the city would be entitled to enter upon the enjoyment of the franchises of the company if it should elect to purchase in 1881, for the reason that a contract entered into now, for ten years, would cover all of the year 1882, but that certainly is not a valid objection to making a contract at this time, especially as the entire question of price and terms of purchasing is to be settled by referees, the manner of whose appointment is provided for in the act, and whose decision is to be final and conclusive between the parties.

The fourth point made by the defendants against the constitutionality of the act is not, in our judgment, well taken. The clause of the constitution upon which they plant themselves is the amendment, which directs that no bill shall be passed by the Legislature containing more than one subject, which shall be clearly expressed in the title.

There is not the least obscurity in the title of this act. Its purpose is the incorporation of the City Sewerage Utilization Company; and in the original act, besides the grant of corporate power necessary to carry into effect the general objects contemplated, is the authority given to contract with the city so cleanse its streets. The supplement enlarges these powers, so as to enable the plaintiffs to take charge of the removal of contents of cesspool and privies, and to erect and operate public urinals. But this enlargement of power does not refer to a subject or purpose which is not germane to the general result to

be attained by the original act, which is the utilization of the sewerage and other offensive matter of the city. These additional powers have relation to the same subject matter, and this is all that is contemplated by the amendment to the constitution, which has been invoked by the defendants. The evil which the amendment was intended to correct was embracing in one bill subjects which were foreign to one another, and which were, therefore, calculated to mislead and deceive. But that cannot be said of the acts incorporating and giving authority to the plaintiffs. No one ought to be misled as to anything contained in the acts; every power granted has relation, more or less direct, to the utilization of matter, which to some extent at least is carried off through the sewers of the city.

The fifth objection is, we think, provided for by the clause which requires the plaintiffs to enter into security for the fulfilment of their contract in the sum of \$50,000, and the further provision, which enables the Board of Health to annul the contract, if not fully complied with by the plaintiffs.

Injunction as prayed for, and as already granted, therefore continued.

[Legal Gazette, Dec. 29, 1871, Vol. 3, p. 424.]

Supreme Court of Pennsylvania.

AT NISI PRIUS. IN EQUITY.

MAYER v. SIMPSON.

Whenever a court of equity originally has jurisdiction of the cause of complaint, and for any reason it becomes impracticable to give the relief specifically cited, it may substitute compensation in damages.

Sur exceptions to master's report

Opinion by SHARSWOOD, J. Delivered December 30th, 1871.

I am not inclined to make a decree in this cause, which can be enforced only by compelling the defendant to pull down the party wall between his house and the house of the plaintiff. Both buildings rest for their support on this wall. The plaintiff's builder accepted this party wall and paid for it. He has used it to insert his own joists in. The foundation wall was right, but owing to want of skill, it has encroached several inches in different parts. Had this bill been filed immediately when the plaintiff knew or ought to have known of the encroachment, and the defendant had gone on pending the bill, there would be both reason and authority for saying that he could be decreed to pull it down. *Clark v. Martin*, 13 Wright, 289. But here the wall was nearly finished before the bill was filed.

No doubt a mandatory injunction may be granted on final hearing. But it certainly is not a matter of right. I may refer to *Senior v. Pawson*, 3 Equity Cases (Law Rep.), 330, when Vice Chancellor Sir W. Page Wood considered it a circumstance entitled to great weight "that damage to a much larger amount would be done by granting the mandatory injunction," and he adds: "I do not think I ought to make a decree which would enable an extortionate price to be obtained for the injury sustained by the plaintiff. Seeing the time which has elapsed before any complaint was made, seeing also that the reasonable mode of doing justice between the parties is by a money compensation, I think that in fairness and in principle the power of the court should be so exercised as to give relief by damages instead of by injunction." In England this relief in damages is given by the Court of Chancery "in addition to or in substitution for" the specific relief to which the plaintiff may be entitled by virtue of the statute. 21 and 22 Vict. c. 27, commonly called Sir K. Cairn's act. The intention of that act "was to give the court power to grant complete relief whenever it had a well-founded jurisdiction to entertain the case, and not to compel a plaintiff to ask partial relief in one court and then turn him over to another in order to obtain supplemental relief." *Headley v. Emery*, 1 Eq. Cases (Law Rep.), 54. I have not the statute at hand to examine, but if it goes no further than is here represented, it seems to me that it does not extend the recognized power of the court. *Dent v. Stewart*, cited 1 Ves. p. 329; *Greenway v. Adams*, 12 Ves. 395; *Phillips v. Thompson*, 1 Johns. Ch. Rep. 131; *Woodcock v. Bennett*, 1 Cowen, 711. Although these are cases on bills for the specific performance of contracts of sale, I see no reason why the same principle should not apply to other cases, and that whenever a court of equity originally has jurisdiction of the cause of complaint, and for any reason it becomes impracticable to give the relief specifically cited, it may substitute compensation in damages. I have felt much inclined to refer this case back to the master to ascertain the damages. To decree that the wall should be removed, would be to enable the plaintiff to demand an extortionate sum. The plaintiff's builder who as to this matter must be regarded as his agent duly authorized, having accepted, paid for, and used the wall, it seems to me he has no equity to ask a decree that it should be pulled down. I have hesitated as to whether after the wall had been finished, or nearly so, the case is not one in which the party should be remitted to his legal remedies. A reference would delay the final decision. On the whole then I have come to the conclusion to dismiss the bill.

Bill dismissed with costs.

[Legal Gazette, Jan. 5, 1872, Vol. 4, p. 1.]

Court of Common Pleas, Philadelphia County.

COMMONWEALTH v. ALLEN et al.

Upon a suggestion for a *quo warranto*, filed by the attorney general for the commonwealth, to show by what warrant the defendants, Wm. S. Allen, Henry Huhn and Nicholas Shane, claimed to have, use and exercise the office of councilmen of the city of Philadelphia, *the court held*:

1. Under the act of Assembly of March 31st, 1860, section 66, the defendants, if they became sureties on an official bond, as alleged, during their tenure of office, either disqualified themselves or wrought a forfeiture of their right to hold their offices.
2. In either case the councils of Philadelphia can alone determine the question, and the court cannot interfere.
3. Whether the act of the defendants be called a cause of disqualification or of forfeiture, the Legislature has provided a remedy by conviction for misdemeanor if the defendants have violated the law, and that is the proper course in this case.

Quo warranto.

Opinion of the court by LUDLOW J. Delivered December 30th, 1871.

The attorney general for the commonwealth, files a suggestion for a *quo warranto*. We are asked to award this writ, that the defendants, William S. Allen, Henry Huhn, and Nicholas Shane, may show by what warrant they claim to have, use and exercise the office of councilmen.

It is alleged these councilmen have forfeited their rights, as such, under the act of Assembly approved March 31st, 1860, section 66, by becoming sureties for the late city treasurer, Joseph F. Mercer

Our power and jurisdiction, if we have any, is based upon the act of June 14th, 1836, whereby courts of Common Pleas may issue writs of *quo warranto* "in case any person duly elected or appointed to any such office, shall have done, suffered or omitted to do any act, matter, or thing whereby a forfeiture of his office shall by law be created."

We have had no difficulty in coming to the conclusions now to be stated, for the law is to us very plain, and our path of duty therefore clear. By the act complained of, these councilmen, if they were such at the time they signed the bond (a point not necessary for us to decide), either disqualified themselves or wrought a forfeiture of the right to hold the office. In either case we think the councils of the city of Philadelphia can alone determine the question.

The 35th section of the act of February, 1854, expressly provides, "That the select and common councils respectively shall, in like manner as each branch of the Legislature of the commonwealth, judge and determine upon the *qualifications* of their members."

By the 45th section of the same law, it is declared, "That all officers elected by the qualified voters under this act shall be subject to removal from office on impeachment for *misdemeanor*

in office, or other *sufficient cause*, on charges to be preferred by the common council, and tried by the select council, in the manner prescribed by the constitution and laws of this commonwealth, as to the impeachment by the House of Representatives, and trial thereof by the Senate. All officers shall be subject to removal for sufficient cause in such manner as councils shall determine."

It has been decided that the city of Philadelphia is beyond all question a municipal corporation, that is, a public corporation, created by government for political purposes, and having subordinate and local powers of legislation. *Phil. v. Fox*, 14 P. F. S. 180.

While this corporation is in one sense a subordinate body, beyond all doubt within the limits prescribed in its organic law, the supreme legislative power of the commonwealth has seen fit to devolve upon it not only legislative powers, but also those rights which, even without express legislation, are usually inherent in every legislative body.

As throwing some light upon the subject, we find an author of authority (Cushing, *Law and Practice of Legislative Assemblies*, p. 477), after speaking of the question of the disqualification of members of a legislative body, adds: "To the disqualification of this kind, may be added those which result from the commission of some crime, which would render the member ineligible, or from some gross official or other misconduct, in consequence of which he is expelled or discharged from being a member. In all these cases, unless there is some express provision of law by which the subject is regulated, the fact of disqualification can only be inquired into and decided upon by the Assembly itself."

In this case, our Legislature, as if to silence any question which might by implication arise from a grant of certain specified legislative power, added two express sections in the act of 1854, conferring the power in plain terms.

Our Supreme Court, whenever they approach questions analogous to the one before us, handle the subject with caution, not because the judges could not exercise their judicial power, but because they evidently desired not to encroach upon the limits fixed authoritatively by law. Whenever a question of the contested election of a councilman has gone before that tribunal, it has refused to act. Why? Simply because the power has been delegated to councils. *Com. v. Leach*, 8 Wr. 332; see also *Lamb v. Lynd*, 8 Wr. 866; *Kerr v. Trego*, 11 Wr. 299.

So in *Duffield v. Loughlin*, and in *Barger's Case*, Leg. Int., 1863, 100, 1, the court carried the principle to the point now contended for, and refused to interfere upon a question of qualification, thus precluding any further argument upon the subject.

But it has been ably contended, that this is not a case of dis-

qualification, but of forfeiture, and, therefore, we are asked to interfere.

Grant, for the purpose of the argument, that this is a case of a forfeiture of the office, why should not the subordinate legislative body try that question of fact? The act of 1854, was, of course, passed long after the act of 1836. The 45th section of this act expressly provides a method by which a member may be impeached and tried "for misdemeanor in office, or other sufficient cause," and the act of 1860, under which these proceedings have been instituted, declares expressly, that a violation of its provisions shall be a misdemeanor.

In *Duffield v. Loughlin*, Leg. Int., 1863, p. 100, the Supreme Court says: "Whenever the corporate law provides a mode of settling disputes therein, without the introduction of the courts, that mode is deemed exclusive of the ordinary remedies, and the judicial authority is dispensed with, because inadequately supported."

If this be true of other corporations, with what additional force do these remarks apply to a public corporation armed with legislative powers.

In addition to all this, speaking for myself, I may remark it is a question how far a judgment of ouster, as against either of these defendants, with the facts now admitted, would be at all necessary, for notwithstanding certain expressions here and there to be met with in our reports, the law as laid down in Lord Bruce's case seems to be most reasonable, for there it was holden, "that if a person has been guilty of anything which amounts to an actual forfeiture, the franchise does thereupon become vacant, and another person may be elected in his room." *Strang's Rep.* 819. *Sayer's Rep.* 248-9.

The only authority which sustains principles apparently at war with our conclusions above stated, is *Commonwealth v. Messer*, 8 Wr. 341; but that case, on close examination, turned not upon a question of qualification or forfeiture, but of *title*, and that this interpretation is the true one is evident from the fact, that in the opinion the court says: "But let us be careful here. This court have no authority to judge whether the election was regularly conducted or not, for that duty is assigned by law to the council. Our duty must be confined to the question *whether there was an office or vacancy to be filled.*"

In conclusion, we remark, that whether we call the act of these defendants a cause of disqualification or of forfeiture, certain it is, that in addition thereto, the act of Assembly declares, that the persons violating its provisions shall be held guilty of a misdemeanor, and on conviction thereof, shall be sentenced to pay a fine not exceeding five hundred dollars. Whether a crime has or has not been committed, is a question not now be-

fore us. When a case shall be presented to the court having criminal jurisdiction, it will doubtless be decided according to law.

Judgment for defendants on the demurrer.

John J. Ridgway, Jr., and Wm. Henry Rawle, Esqs., for the commonwealth.

Wm. Ernst and John C. Bullitt, Esqs., for defendants.

[Legal Gazette, Jan. 6, 1872, Vol. 4, p. 6.]

Supreme Court of Pennsylvania.

AT NISI PRIUS.

BURNHAM v. LANING et al.

The plaintiff, a woman, brought suit against the election officers for refusing her vote at the general election held in Philadelphia, October 10th, 1871. Upon a demurrer to the declaration the court held:

1. A woman born in this country or naturalized is as fully entitled to the protection of the government as a man.
2. But it does not follow that the elective franchise is one of the privileges which she enjoys under this protection.
3. This elective franchise is exclusively regulated by the constitution of Pennsylvania.
4. The word freeman in article three, section one of the constitution, was not meant to include the female sex, and the plaintiff is therefore not entitled to vote.

Opinion by SHARSWOOD, J. Delivered December 30th, 1871.

The plaintiff, a woman, declares against the defendants, the election officers of the Eleventh Election Division of the Fourteenth Ward of the city of Philadelphia, for refusing her vote at the general election held on the tenth day of October, 1871, averring that she was duly qualified in all respects, according to the constitution and laws of this commonwealth. The defendants demur, and assign, among other causes of demurrer, that the declaration shows that the plaintiff is not a *freeman* in that sense in which that word is used in the constitution, article iii., section i. It is beyond all question that the provisions of the ninth article of the constitution, commonly called the declaration of rights, extend to and include both sexes, and that when the word "men," or "man" are therein used, they comprehend also woman. It is equally clear, that a woman who is born in this country or naturalized, as she may be under the acts of Congress, is a citizen as fully entitled to the protection of the government as a man, and with a right to fully enjoy all the privileges which properly belong to citizens. But it does not follow that the elective franchise is one of their privileges. That is exclusively regulated by the constitution, which, has excluded many citizens from it by means of age, non-payment of taxes, non-residence within the commonwealth and

election district for a certain length of time. Nor can I perceive that the fourteenth and fifteenth amendments of the Constitution of the United States, have any bearing or application upon the matter. The third article, section one of the constitution of Pennsylvania, does not, in this respect at least, abridge the privileges or immunities of citizens of the United States, for the elective franchise is not one of them, nor is the right of the plaintiff to vote denied or abridged "on account of race, color, or previous condition of servitude."

We are reduced then to the simple inquiry whether the word "freeman" in article third, section one, constitution of Pennsylvania, was intended to confine the right to vote to citizens of the male sex. This section, so far as the matter in hand is concerned, is in effect copied from the constitution of 1790, and that followed also the constitution of 1776. In the latter, chapter second, article six, it is provided, "every freeman of the full age of twenty-one years, having resided in this State for the space of one whole year next before the day of election for representatives, and paid public taxes during that time, shall enjoy the right of an elector. Provided always, that sons of freeholders of the age of twenty-one years, shall be entitled to vote, although they have not paid taxes."

The constitution of 1790, had also a similar proviso, showing clearly that by freeman, only a male was intended. For surely had it not been so, the daughters as well as the sons of freeholders, or of qualified electors, would have been included. When the meaning of the word "freeman" is thus clearly ascertained from the language of the constitutions of 1776 and 1790, there can be no doubt that it ought to have the same meaning in the amended constitution of 1839, although the proviso is not expressed in the same form, not being confined to the sons of qualified electors, but to all freemen between the ages of twenty-one and twenty-two.

There is only one other clause in the constitution, in which the word freeman is used, and there it is most unquestionably confined to males. Article six, section two, declares that "the freemen of this commonwealth shall be armed, organized, and disciplined for its defence, when and in such manner as may be directed by law." It is clear that the constitution contemplates that the class of persons who do the voting, shall also do the fighting. The corresponding clause in the constitution of 1776, is still more clear and emphatic:—"The freemen of this commonwealth, and their sons, shall be trained and armed for its defence." Chap. ii., sec. v. The uniform construction of the provincial constitutions and charters, in which the same word is employed, as well as under the constitutions since the Revolution, has been in accordance with the doctrine that none

but males have the right to vote.—*Contemporanea expositio est optima et fortissima in lege.*

In *The Commonwealth v. North et al.*, 3 Hazard's Reg. 228, the Supreme Court of this State, decided when the charter of a church gave the right to vote to members generally, that the fact that for twenty-five years the females of the church had not voted, was conclusive, Chief Justice Gibson remarking:—"There is no safer exposition of what was intended by such an instrument, than usage. We can say that we have in Pennsylvania a uniform and uninterrupted usage of nearly two hundred years, showing that women were never intended to possess the elective franchise." Such a usage ought to settle the construction, even if the words of the constitution were more general and comprehensive than we have seen them to be.

Judgment for the defendants.

D. Y. Kilgore, Esq., for plaintiff.

R. H. Hinckley, Jr., for defendant.

[Legal Gazette, Jan. 5, 1872, Vol. 4, p. 5.]

Supreme Court of Pennsylvania.

AT NISI PRIUS.

JOHNSON v. THOMAS SALE.

1. In settling a partnership account everything growing out of it between the parties must be brought to an end.
2. Leave granted to file an amended answer upon an honest mistake.

Sur motion for leave to file amended answer.

Opinion by SHARSWOOD, J. Delivered December 30th, 1871.

Undoubtedly at this stage of the cause such amendment should not be allowed unless on sufficient cause shown. But the affidavits produced have satisfied me that there was a mistake most probably of counsel, an honest misstatement, not supposing it to be material as it may turn out to be. I am far from thinking that such a mistake, even though sworn to, cannot be corrected. I cannot see what injustice will be done to the plaintiff by allowing this amendment. I am strongly inclined to think it unnecessary, and that no more can be gained by the defendant upon the account than without it. All the liabilities of the plaintiff to any old firm whose assets were transferred to the new must be brought into account; for in settling a partnership account everything growing out of it between the parties must be brought to an end. The settlement must be complete and final. But I mean to intimate no opinion which shall be binding on the master. He must act upon his own judgment upon the pleadings and evidence before him.

Amendment allowed.

[Legal Gazette, Jan. 5th, 1872, Vol. 4, p. 2.]

Supreme Court of Pennsylvania.

AT NISI PRIUS.

McCALLION v. GEGAN.

Trespass quare clausum fregit is a cause of action which survives against executors and administrators.

Sur demurrer to plea.

Opinion by SHARSWOOD, J. Delivered December 30th, 1871.

This was an action of trespass *quare clausum fregit* brought against Gegan and two others. Gegan pleaded "not guilty"—whether it was at issue as to the other defendants does not appear on the papers submitted to me. Gegan died and his death was suggested. Thereupon a *scire facias* issued to bring in his executor, who appeared and pleaded, specially that he ought not to answer to the action, "because the same is not such a cause of action as by law will survive against him, this defendant as the legal representative of the said John Gegan, deceased." To this plea there is a general demurrer. I do not stop to inquire whether the executors of a deceased party can be sued jointly with co-trespassers. That point is not here made, and it may be, does not arise on this demurrer. The question of misjoinder is perhaps an open one, to be taken advantage of hereafter. We have to consider the mere question whether trespass *quare clausum fregit* is a cause of action which survives against executors and administrators. At common law it undoubtedly did not. It is a personal action and the rule was *actio personalis moritur cum personâ*. *Nicholson v. Elton*, 13 S. & R. 415. The twenty-eighth section of the act of February 24th, 1834, Pamph. L. p. 78, provided that "executors or administrators shall have power to commence and prosecute all personal actions which the decedent whom they represent might have commenced and prosecuted except actions for slander, for libels and for wrongs done to the person, and they shall be liable to be sued in any action, except as aforesaid, which might have been maintained against such decedent if he had lived;" and the twenty-seventh section of the same act also provides that whenever the cause of action doth by law survive, the executors or administrators of any such party to a pending suit dying, may be proceeded against by *scire facias*, and made parties thereto. Why any further legislation was needed to meet the case I am at a loss just now to perceive; but by the act of April 12th, 1869, Pamph. L. 27, it is expressly enacted that no action or right of action for mesne profits or for trespass against property, real or personal, shall abate by

reason of the death of the person liable therefor, but suit may be brought and recovery had against the personal representative of such deceased person; and if such death occur after suit brought, the personal representatives may be substituted for the decedent, and said suit prosecuted to judgment, and the estate of such deceased person shall be liable to the same extent as if he were living." Upon this state of the law then, this plea must be adjudged bad.

Judgment for plaintiff, that John Mason, executor of the last will and testament of John Gegan, deceased, be and he is hereby made a party defendant to the said action.

[Legal Gazette, Jan. 5, 1872, Vol. 4, p. 5.]

Supreme Court of Pennsylvania.

AT NISI PRIUS.

BIRDSALL v. PHILLIPS.

On a rule for a new trial, the court ordered a remittitur of part of the damages awarded by the verdict and refused the rule.

Sur rule for a new trial.

Opinion by SHARSWOOD, J. Delivered December 30th, 1871.

After much reflection, I have come to the conclusion, that this verdict ought not to stand without a remittitur of some part of the damages. The plaintiff's own estimate of their injury was only five hundred dollars more than the verdict, and the basis upon which it was made did not allow for the great age of the trees said to have been destroyed. The principal value of the property is prospective for building lots; apart from the value thus imparted to it, I hardly think it would command eight thousand dollars, yet the shrubbery is estimated at more than half the value of the land and improvements. I am afraid the jury were carried away by their sympathy for the ladies, plaintiffs—against a defendant whose testimony and bearing on the trial were little calculated to conciliate them.

Upon the plaintiff's filing a remittitur damna of one thousand dollars, rule discharged.

[Legal Gazette, Jan. 5, 1872, 4, Vol. p. 5.]

Supreme Court of Pennsylvania.

AT NISI PRIUS.

McNICKLE v. HENRY.

- 1 The guardian is entitled to all such reasonable allowances as any other trustee would be.
- 2 A trustee is bound to keep up insurances which were on the property when it came into his hands.

Sur exceptions to master's report.

Opinion by SHARSWOOD, J. Delivered December 30th, 1871.

I cannot agree with the learned master in the principles upon which he has settled this account. By the act of April 20th, 1869, Pamph. L. 77, the widow has as much right as the guardian to institute proceedings in partition, and it was no more his duty than it was hers. If the estate under such proceedings would eventually have to go to a sale it might be very much the interest of all parties to postpone the proceedings. The guardian of the minor heirs remained, therefore, the rightful bailiff of the property down to the time when the final decree was made in the partition and in the Orphans' Court. He had a perfect right to resist the bill in equity for an assignment of the dower by metes and bounds, if in law, as we must now assume, the court had no jurisdiction. He is entitled, then, to all such reasonable allowance as any other trustee would be, down to the close of his relation to the property.

As to the particular items, it appears to me, that the defendant was entitled to credit for the premiums annually paid to keep up the insurance which had been effected by the decedent in his lifetime. I am inclined to this opinion, notwithstanding a decision to the contrary, in *Lewin on Trusts*, 383, and the case of *Fry v. Fry*, 27 Beav. 146, cited and relied on by the master, that a trustee is bound to insure, especially to keep up insurances which had been effected and were on the property when it came into his hands. It is conceded that if there had been a loss it would have enured to the plaintiff, and I think it probable, as did the master, that if the premises had been destroyed by fire we would not have heard of this objection from the plaintiff. As to the other items I agree with the master, except as before mentioned, as to the limit of time he has fixed.

Exceptions sustained except 7th and 8th, and case recommit-
ted to the master, to report and account conformably thereto.

[Legal Gazette, Jan. 3, 1872, Vol. 4, p. 3.]

Supreme Court of Pennsylvania.

AT NISI PRIUS.

PARRISH v. BROOKS.

1. An administrator *de bonis non cum testamento annexo* can sue the representative of his predecessor for assets actually converted.
2. An assignee of a security standing in an executor's name, takes it with notice of a breach of trust if there is one.

Opinion by SHARSWOOD, J. Delivered December 30th, 1871.

I have no doubt of the right of the plaintiff, as the administrator *de bonis non cum testamento annexo*, to maintain this bill. Under the thirty-first section of the act of February 24th, 1834, Pamph. L. p. 78, sec. 31, he could sue the representative of his predecessor for assets actually converted. *Carter v. Freeman*, 7 Barr, 315; *Stair v. York National Bank*, 5 P. F. Smith, 364; *Bowman's Appeal*, 12 P. F. Smith, 166. Equity would follow them as long as they could be identified, until arrested by the equity of a purchaser without notice. *Meeser v. Eckhart*, 7 Harris, 201. A party to whom a security is assigned, standing in the name of an executor as such, in discharge of a private debt of the executor, takes it with notice of a breach of trust, if there is one. "The assets are a fund in his hands, not for the payment of his own debts but the debts of the testator and the legacies bequeathed in the will; and when the assignee knows at the time, that he is receiving his debt out of a fund, which is not the property of the person paying, but which is appropriated to the payment of other debts (and legacies), that alone is a circumstance of suspicion that ought to put him on inquiry as to the propriety of the transaction." *Gibson, C. J., in Petrie v. Clark*, 11 S. & R. 386. It seems to me then that upon the allegations of this bill there is sufficient equity disclosed to call upon the defendant to answer.

Demurrer overruled.

[Legal Gazette, Jan. 5, 1872, Vol. 4, p. 5.]

Supreme Court of Pennsylvania.

AT NISI PRIUS.

BURNS v. ASHTON.

1. A declaration of no defence or set off on a mortgage avails a subsequent as well as the first assignee.
2. A second assignee, to avail himself of such declaration, must be an assignee for value.

Sur exceptions to master's report.

Opinion by SHARSWOOD, J. Delivered December 30th, 1871.

I am not prepared to hold with the learned master that a declaration of no defence or set off on a mortgage only avails

the assignee to whom it is given. Why should he not be able to put some one else in his place? A purchaser for value with notice may protect himself under the equity of a prior purchaser without notice. It would much interfere with the value of mortgages as marketable securities to hold otherwise. If the purchaser from the assignee must obtain a new declaration, the assignee might find the market closed on him. He could not sell if the mortgagor should refuse to give the declaration. What benefit would this be to the mortgagor? The assignee by proceeding on the mortgage could preclude him from any defence by the use of the estoppel. Undoubtedly the second assignee takes subject to any subsequent equity. Yet a second assignee to avail himself of such declaration must be an assignee for value, and it is incumbent upon him to make that appear clearly. The answer of Ashton is very vague, and on the whole I should conclude that there was no advance specially on this mortgage at the time it was assigned and handed over. It was delivered as a collateral to ruin a prudent indebtedness. There are other circumstances which have brought my mind to the conclusion that these exceptions should be dismissed.

Exceptions dismissed and report confirmed.

[Legal Gazette, Jan. 5, 1872, Vol. 4, p. 6.]

Supreme Court of Pennsylvania.

AT NISI PRIUS.

ROGERS v. WILLIAMS et al.

Equity rules 14 and 44, make no provision for the printing of examiners' reports, and in taxing costs no allowance will be made for such printing.

No. 44, January Term, 1869. Taxation of defendant's bill of costs.

1st. Item allowed, namely, proportion of examiner's fees, &c.,	\$58 30
2d. Item also allowed, it being for printing exceptions to supplemental report of master,	6 00
3d. Item for printing <i>paper book</i> not allowed.	
4th. Item allowed, it being for printing exceptions to master's report,	15 00
5th. Item, witnesses' fees allowed,	2 50
6th. Additional item added, namely, for printing answer to bill,	12 00
	<hr/>
	\$98 80

Attest—JAMES ROSS SNOWDEN,
Prothonotary.

Prothonotary was attended in this taxation by Mr. *Bispham* for the exceptions, and by Mr. *Law* for the bill of costs, November 17th, 1871.

See rule 14th, and latter clause of rule 44, Equity Practice.
J. R. S.

Since I made the taxation within set forth, my attention has been recalled to the first item of charge, with a statement that it is composed of two parts, namely, \$80, "proportion of examiner's fee," and \$28.80 for printing the examiner's report, and I am asked to disallow the latter. I am inclined, however, to adhere to the decision which I made. It may be admitted that the printing of the testimony is not *eo nomine*, provided for in the rules, allowing the amount paid for printing the pleadings, &c., as costs of the cause, yet, as in this case, an examination of the evidence by the court was necessary, in order to decide the questions which arose on the exceptions to the report of the master, the printing of it was useful for the convenience of the court. And although not technically a part of the pleadings it presented the proofs to support the bill on the one hand, and the averments of the answer on the other. The charge in question, therefore, it seems to me, comes within the reason and spirit of the rules of equity practice.

JAMES ROSS SNOWDEN,
Prothonotary.

November 18th, 1871.

Appeal from prothonotary's taxation of costs in equity.

Opinion by SHARSWOOD, J. Delivered December 30th, 1871.

The printing of the evidence taken by an examiner may be often a very great convenience to the court when an examination of it becomes necessary, but in our practice of referring all causes to a master to report on the evidence it may not be necessary. I have no doubt the court may specially order the evidence to be printed, but it should be upon cause shown. The parties may agree to print and divide the expense proportionately, and such agreement will be enforced. In the absence of such agreement each party may print his own testimony, which will generally drive the other party to print his. Rules xiv. and xlv. in equity make no provision for the printing of examiner's reports, as they do in regard to pleadings, amendments and exceptions, and without a general or special order I do not see any authority for allowing it as costs in the cause. The exception in this case is only to the prothonotary's taxation, so far as the allowance for printing the examiner's report is concerned, and that exception I feel compelled to sustain.

Exception sustained. The taxation referred back to the prothonotary to be corrected accordingly.

THIRD JUDICIAL DISTRICT.

Composed of the counties of Northampton and Lehigh.

Register's Court.

In re ESTATE HENRY ABLE, dec'd.

1. The register cannot issue letters of administration to a stranger in blood, to the exclusion of any of the kindred willing and competent to undertake the trust, even if such stranger is preferred by a majority of those first entitled.
2. The act of the register in revoking letters is a unit, and the revocation cannot be partial, but must be of the letters as a whole.
3. Administration is a personal privilege in the nature of a trust and cannot be assigned, hence the assignee of the interest of the eldest is not entitled to administration being a stranger in blood as against one of the kindred; one having interest alone must yield to one having both kinship and interest.
4. In the grant of letters of administration the register should *ceteris paribus*, prefer the eldest of a class.
5. Elizabeth the eldest sister, and Susan the next eldest, claim the administration, but as Susan is preferred by a majority in interest and has already partially administered they will be joined in the letters of administration.

Opinion by LONGAKER, P. J.

Henry Able died intestate, October 23d, 1868, unmarried and without issue, leaving to survive him as next of kin, a brother, Jacob Able, Elizabeth Unangst, the eldest sister, now a widow, Susan Able, next eldest sister, and Sarah Shirely, the youngest sister now the widow of George Shireley deceased, and issue of David Able, a deceased brother, to wit: George, William, Edward, David, Isabella, Amanda, intermarried with Henry Hinkle; Tilghman, James, Mary, a minor, of whom Simon Frankenfield is guardian; and Anna, a minor, of whom Thomas Herman is guardian.

On the 2d day of November, 1868, letters of administration were granted by the register to Susan Able and David Edleman. David Edleman is not the next of kin, but a stranger in blood to the decedent. He was, however, joined with Susan Able, at her request, and the request of the youngest sister. At the time letters were granted the eldest brother, Jacob Able, had not renounced his right nor was the register informed that he was then living. The statement made to the register was "that there was a large estate and nobody to take care of it." There was nothing said as to the next of kin. They said "there was a brother living in Luzerne county, but they did not know whether he was living or not." "They hadn't heard from him for some time." * * * "There was nothing said about the rights of other parties to letters. There was no contest before me on that subject."

On the 13th day of November, 1868, Jacob Able, the eldest brother, who is living in Luzerne county, signed and filed his renunciation to the right of letters of administration, in favor of Susan Able and David Edleman, to whom letters had been previously granted. On the same day Jacob Able executed a deed, conveying to S. V. B. Kachline all his interest in and to the real estate, in fee simple, and in the same deed transferred all his interest in the personalty for the consideration of \$8,500.

November 20th, 1868, Elizabeth Unangst filed an application before the register asking a revocation of letters, and claiming the right of administration. Upon this application the register ordered the convening of the Register's Court to determine the matters therein set forth.

December 22d, 1868, during the sitting of the Register's Court, all the children of David Able, deceased, except two, and Elizabeth Unangst, filed a paper asking the revocation of letters. Same day Sarah Shirely, Susan Able and S. V. B. Kachline, alienee and transferee of Jacob Able, and the two remaining children of David Able, filed a paper in favor of the letters granted to Susan Able and David Edleman. Same day Mr. Kachline filed a paper claiming the first right to letters in the event of revocation.

It is contended on the part of the petitioner that the letters to Susan Able and David Edleman, have been illegally and improvidently granted. Illegally, because a stranger in blood is joined with one who is of a class entitled; improvidently, because the register did not pass upon the rights and qualifications of the eldest sister, in adjudicating with the claims of her younger sister, Susan Able.

It is admitted by the petitioner, that the register may select any one of those from the class entitled, and in so doing may pass by an elder and take the younger when the younger shows greater competency than the elder.

While it is the settled law of this state, that primogeniture does not present superior claims amongst those of the same class, it is, nevertheless, a wholesome rule, *cæteris paribus*, that the register should always prefer the eldest to any of the younger. If it once becomes the settled custom of the register to grant letters of administration to that one of a class, who shall first present himself without any regard to seniority of birth, it is to be apprehended that such a procedure, in the scramble to be first would produce many disgraceful scenes and provoke many unpleasant family quarrels. It is, therefore, a wise exercise of discretion, and one which should never be disregarded except for a good cause, never to reject the elder and appoint the younger, when selecting from those of the same class.

While the register may pass by the elder, can he select a younger and join therewith in the grant a stranger? The petitioner asserts that he cannot, while the respondents say he can.

While it is the settled law, that the register has original and exclusive jurisdiction to appoint any one from a class, yet it has nowhere been decided that he may pass by one in that class, who is competent, and appoint one in the next class in order, or a stranger, even if those first entitled should renounce and present their nominee to the register. Such nomination must be disregarded, unless the nominee be of the same class as the claimant.

In *Elmaker's Appeal*, 4 Watts, 84, the nominee of all the heirs but one, the nominee being a stranger, was sustained, excluding the one claiming. The claimant was rejected, however, upon the ground of legal incompetency, being a party litigant, and also upon the ground that he was the husband only of the heir who had not joined in the nomination, and being not of the blood of the decedant, he was treated as a stranger.

In *Sarkie's Appeal*, 2 Barr, 157, letters were granted to a stranger, upon the nomination of a sister, and the mortgages of the eldest brother (the eldest brother being absent from the country), and on his return he asked a revocation of letters. His claims were rejected upon the ground of non-residence and a want of interest in the residue of the personal estate.

In *William's Appeal*, (*Schaeffer's Estate*), 7 Barr, 259, it is expressly decided that where the two sons, who were appointed executors, renounced, nominating a stranger, the register cannot accept that nomination and appoint a stranger to the exclusion of the remaining sons next entitled.

In *McClellan's Appeal*, 4 Harris, 115, it is said: "It has never been understood, as is contended, that the widow, or the next of kin, or both combined, having the greatest stake in the estate, can pass by any one of the children or next of kin competent and willing to take and vest the appointment of a stranger."

In *Hassinger's Estate*, 10 Barr, 454, both claimants—who were the next of kin—were declared by the Register's Court incompetent, and letters issued to an impartial stranger.

In *Bieber's Appeal*, 1 Jones, 157, the claim of the eldest son was rejected, because of incompetency, as a party litigant, and a stranger appointed upon the nomination of the others next entitled.

These cases fully establish the doctrine, that the register cannot accept a stranger, even if he be the nominee of a majority of those first entitled and of those representing the largest in-

terest, to the exclusion of any one of the kindred, who is willing and competent to take the grant. Nor has it ever been decided in this State that a stranger may be joined with one who is entitled, when an objection thereto has been properly interposed.

The statute confers upon the register the right to join with the widow "such relation or kindred, or such one or more of them, as he shall judge will best administer the estate, preferring always of those so entitled to such as are of the nearest degree of consanguinity with the decedent, and also preferring males to females." While he had the discretion to join those next entitled, can he pass them by and unite with the widow a stranger? We think not, because it would be in express violation of the statute. He must either grant letters to the widow alone or else join one or more of those next entitled. Where the statute denominates those of a class who may be joined, the converse would be, that he who is not named is excluded. If a stranger cannot be joined with the widow, for the same reason a stranger cannot be joined with one of the next of kindred, to the exclusion of those equally entitled.

To permit the register to join a stranger would, in many instances, prevent him from committing letters, as he may do, to one or more of the same class. Again, the statute not only requires the selection of kin, but prescribes, as a further qualification, that the appointee shall be entitled to an interest in the residue of the personal estate, or to a share or shares therein after the payment of the decedents debts.

While we are unaided by authorities in our own books we have it expressly decided by English decisions that such a grant is revocable. In *Brown v. Wood* (Aleyn, 36), 1st Williams on Executors, 481, it is said: "The ordinary may repeal his grant of administration, when made to other than next of kin, as to a sister and her husband. (The husband not being of the blood of the decedent is treated as a stranger.)"

As our statute much resembles that of the English, and the office of the register corresponds with that of the ordinary, that authority will aid and control in deciding a similar point, especially when our statute, by implication, seems to forbid the joining of a stranger with the widow, to the exclusion of the next of kin, who may be willing to become joined with her.

It is, however, contended by the respondents that if the letters have been improvidently granted to David Edleman, the grant may be revoked as to him and stand as to Susan, because since the renunciation of the oldest brother, she is of the class next entitled; and the register having once made a choice from a class next entitled, his jurisdiction has been rightfully exercised, and that act consequently has become irrevocable. That

this point has been fully decided in *Shomo's Appeal*, Legal Int. vol. 25, p. 300, there can be no doubt; but the cases are not analogous. In *Shomo's Appeal*, the widow renounced, nominating a younger son, who was one of a class not entitled. In this case, the renunciation of Jacob Able, the only brother, is in favor of Susan Able, one of a class next entitled, and uniting with her a stranger, David Edleman, who is not entitled at all. This renunciation is qualified and must be accepted or rejected as a whole; and if rejected, the right to letters would revert to the next of kin, the same as if no renunciation had been made. *McClellan's Appeal*, 4 Harris, 116.

Again, the register, in his testimony (when recalled), says: "I have known Mr. Edleman for many years. I regard him as a man fit for such a trust." It may, therefore, be well inferred from this knowledge of the fitness of David Edleman, that the register was induced to grant the letters without inquiring into, or passing at all upon the competency of Susan Able. While if she had presented herself alone, the result of the adjudication might have been different.

The act, therefore, of the register must be viewed as a unit. It was but one judicial act, decided upon the facts as they existed in regard to both applicants. In the revocation of letters there can be no severance. We are, therefore, of the opinion, that the letters granted to Susan Able and David Edleman must be revoked.

The question next presented is, who is entitled to letters, and has the Register's Court power to grant them, or must it be referred to the register alone? That the court has such authority cannot be seriously doubted. The act of 15th of March, 1832, section 39, page 146, say: The Register's Court "may and shall do all such judicial acts in all matters lawfully brought before them, as belong and of right ought to belong to the office of said register." In *William's Appeal*, 7 Barr, 259, the Register's Court, after revocation of letters, granted them to the petitioner.

It is claimed by the respondents that S. V. B. Kachline, the alienee and transferee of Jacob Able, is first entitled. If Jacob Able was still the owner of his interest in the personalty, there is no doubt that he would be first entitled, because his renunciation was conditional, and being rejected, the right still remains in him. *McClellan's Appeal*, 4 Harris, 166. His alienee, however, stands upon a different footing—he is a stranger in blood to the decedent. That he is the alienee of real estate can add no force to his claims. If he be entitled at all, he must rest his claims upon the grounds of a transferee of the personalty.

The act of 15th of March, 1832, 22d section, prescribes that

letters shall be granted "to such of his (the deceased's) relations or kindred, as by law may be entitled to the residue of his personal estate, or to a share or shares therein, after the payment of his debts."

It is claimed that the partition act is similar to the administration act, and as the alienee in partition has been held to be entitled to the choice and share of his alienor, so the transferee of the personalty will succeed to the right of administration of his transferee.

The act of 29th of March, 1832, 37th section, relative to partition, gives the right of choice to the homestead: 1st, To the eldest son, if he be living; but if he be dead, to his children, if any, in the order of their birth, preferring males to females, and in like manner to the other lineal descendants in like order. 2d, To the second eldest son (if the first class decline) and to his lineal descendants, &c. * * * *

A strict comparison of these acts will show but few, if any analogies; while on the other hand, there are many dissimilarities. The right of election of the homestead, is an incident attached to the real estate, and the alienee become so entitled as the legal holder of the fee, clothed with power to sue in trespass, or bring ejectment for protection and enjoyment of his interest; while the transferee of personalty is only an equitable owner, vested with no power to take into actual possession the property thus acquired, in the decedent's estate, but can only sue in the name of his transferee, to his use and can only obtain his share in money, after the personal assets have been marshalled by the due course of administration. In partition, the election descends to the lineal heirs; in administration it dies with the person. In partition the proceedings are *in rem*, conferring an interest in the *res* only to the elector. In administration it is personal, granting a trust in the nature of an office, requiring qualifications of kindred, interest and personal fitness, and against the grant there are interposed several legal incompetencies, which entirely disqualify the applicant. Partition relates exclusively to real estate. Administration operates solely upon personalty.

In the partition act of 1832, and in the former act of 1794, there are no express words to permit the alienee to succeed to the right of choice of his alienor; nor by the act of 1794 are the children, or lineal descendants of one deceased, entitled to the choice their master would have had, if living; yet in *Hersha v. Brenneeman*, 6 S. & R. 4, it was held, the children of the deceased's eldest son succeeded to the first choice of the homestead, in the estate of their grandfather. This decision, however, was based upon the equity of the statute, and upon the principle that the ownership of the interest carried with it

every incident attached to it in the hands of the person represented, and also that a contrary decision "would doubtless have the effect of disturbing many titles."

In *Ragan's Estate*, 7 Watts, 438, the question was first decided that under the act of 1832, the alienee of one of the kindred of an intestate will succeed to the right of choice of his alienor. It is expressly said that the right of choice is not personal, "for if personal it would not descend to the issue." It is, therefore, an incident attached to the realty, and by conveyance passes to the grantee. In *Ragan's Estate*, the decision is put not only upon the equity of the statute but based especially upon a practice which had long been established in the courts in all parts of the State; such ruling, therefore, was necessary to protect the many titles which had already vested under the practice.

The cases referred to in 6 P. F. Smith, *Thompson v. Still*, 158-9, and *Stewart's Est.* 241, go no further than to confirm the doctrine ruled in *Ragan's Estate*.

Thus, while we have well established practice and expressed decisions under the partition act, that the alienee succeeds to the right of choice and to the share of his alienor, we have nowhere been referred to authority, or made acquainted with an existing practice, that the transferee of personalty, succeeds to the right of administration; nor do we find that the language of the two acts and the practice under them, are so analogous as to warrant a similar construction.

In administration the requisites are kindred, an interest in the residue of the personalty, and competency. Under the act we have express decisions that the kindred cannot be excluded, when competent, to admit a stranger. A stranger will only be admitted to letters, when all kindred renounce, or are legally incompetent. Interest is not paramount to kindred, but a quality which must always unite with it, when kindred are the applicants.

Administration is a personal privilege, an office in the nature of a trust. An executor "may accept or refuse the office, but he cannot assign it." *Gordon on Decedents*, 82. In 1 *Williams on Executors*, 331, it is said: "Administrators are the officers of the ordinary, appointed by him in pursuance of the statute." Many of the American decisions speak of administrators and executors as officers. In *Bower v. Bower*, 2 Casey, 77, Justice Woodward says, it is "a trust in the nature of an office," * * and "if public policy forbids traffic in an office of postmaster, as was decided in *Frison's Trustees v. Hemis*, 5 Barr, 456, it will, for superior reasons, interdict barter in respect to the more sacred trust of administration." From

these decisions we educe the rule, that administration is an office incapable of assignment and barter.

In this case it cannot perhaps be said that Mr. Kachline did barter for the office of administrator, but he has done what is tantamount to it; because if he succeeds at all to the right of administration, he can only do so by virtue of his purchase of an interest in the personal estate. To permit this will invite traffic and barter in the right to letters of administration, which has been decided to be contrary to public policy. 2 Casey, 77. S. V. B. Kachline, must, therefore, be excluded from the right to letters upon his claim as transferee of the interest of Jacob Able, so long as there are those of the next of kin willing and competent to take, because kindred and interest united are superior to, and form a class prior to mere interest alone.

Elizabeth Unangst and Susan Able are opposing claimants, who ask the issuing of letters. They are of the same class and equally competent, so far as education and business habits enter into competency. All things else being equal, it is a proper exercise of discretion to prefer the eldest. In this instance the youngest had lived for many years with the decedent, and was still living with him at the time of his death. She has also partially administered the estate, and presents the recommendation of a majority of the interest in her favor; for these reasons it is claimed that she should be preferred to her eldest sister. The recommendation of those holding the largest interest, while it does not absolutely control the grant, should in all proper cases be respected; *McClellan's Appeal*, 4 Harris, 115; but the eldest should not for slight reasons be excluded.

When the contest is between two of the same class, and both, as regards educational and personal fitness, are equally qualified, it is eminently proper to commit the letters to both, so that the action of the court may not encourage litigation between sisters, but rather invite an amicable settlement of the estate of their deceased brother.

Some allusion was made, during the argument, to a want of educational fitness of the applicants. The statute, however, does not require an educational standard; to disqualify there should be such a degree of incompetency as to amount to an inability to take care of the person and estate. The English doctrines, is that "all persons who are capable of making wills are capable of being made executors." 1st Williams on Executors, 185.

The word incompetency, as it occurs in the statute, however, has a well defined legal signification. In *Cornpropt's Appeal*, 9 Casey, 538, insolvency is mentioned. In *Sarkie's Appeal*, 2 Barr, 127, non-residence and a want of interest in the residue

of the personal estate, and in *Beiber's Appeal*, 1 Jones, 157, being a party litigant; so that in no instance has the want of educational qualification been declared to be a legal incompetency.

And now, to wit, January 25th, A. D. 1869, it is ordered, adjudged and decreed that the letters of administration heretofore granted to Susan Able and David Edleman be and the same are hereby revoked; and further, that new letters of administration shall be and are hereby issued to Elizabeth Unangst and Susan Able, upon condition that they severally enter into an administration bond, with two or more sureties, in the sum of twenty-eight thousand dollars, to be fully perfected on or before the first day of February, A. D. 1869, and if either of the said applicants shall fail to accept and qualify within the time as above limited, then in that case letters shall be issued to the one able and willing to comply with this decree.

[Legal Gazette, July 16, 1869, Vol. 1, p. 18.]

EIGHTH JUDICIAL DISTRICT.

Composed of the counties of Northumberland and Montour.

Orphans' Court, Northumberland County.

ESTATE OF HERMAN KLINE, deceased.

1. Where a decedent dies seized of real estate with a mansion house thereon, and leaves only a widow and collateral heirs, and the widow petitions for an inquest to make a partition of the estate between herself and the collateral heirs, the inquest must include the mansion house in their valuation.
2. The widow in such case is entitled to the mansion house for life, but the value of it must be included, whether the estate is or is not susceptible of partition, she is only entitled to one-half the estate in value, not in quantity.

Sur exceptions to award of inquest to make partition.

Opinion by JORDAN, P. J.

Herman Kline died intestate, leaving a widow, but no lineal descendants. He left brothers of the whole blood, and children of a deceased sister. His real estate consisted of a tract of land, containing sixty-five acres, whereon the mansion house and other buildings are erected. His widow presented a petition to the Orphans' Court of Northumberland county, praying the court to award an inquest to make partition of her husband's estate among her and his collateral heirs. An inquest was awarded, who made return, that the real estate of the

decedent could be equally parted and divided between the widow and collateral heirs of the decedent, into two equal parts, having regard to the true value thereof, and that they therefore parted and divided the same, awarding to the widow purpart No. 1, particularly designated by metes and bounds, containing thirty-two acres, one hundred and seventeen perches strict measure, which they valued at \$1,636.36. That the mansion is situated on this purpart, but that they did not put any valuation on it, and the buildings appurtenant. Purpart No. 2, containing twenty-four acres and one hundred and seventeen perches, they valued at the same sum. Exceptions were filed to the inquisition by the collateral heirs.

1. Because more than one-half part in amount and value was assigned to the widow.

2. Because the inquest did not make partition among the heirs of intestate, and did not state whether the part left for them could be parted among them or not.

3. Because the inquest did not state whether or not the land could be divided into more than two purparts.

4. Because the inquest did not find whether the premises could be divided among the heirs or not.

5. Because the inquest allotted and assigned to the widow a portion of the land for life, without assigning to each of the heirs a portion in severalty, and without finding whether such a partition among the widow and all the said heirs could be made without prejudice to or spoiling the whole.

6. Because the value of the two purparts is grossly unjust and unequal.

I am not aware of any decision of our Supreme Court, on the main objection made to the proceedings, to wit, in not valuing the mansion house.

Where an intestate leaves a widow and issue, she is entitled to one-third part of the real estate during her natural life. Where he leaves a widow, and no issue, but collateral heirs, she is entitled to one-half of the real estate (including the mansion house) during the term of her natural life. Was it the intention of the Legislature in the latter case, to give the widow one-half of the estate in quantity, or in value? Why did the Legislature allow her one-third where there was issue, without including the mansion house, and direct that where there was no issue she should have half the real estate, including the mansion house? Under our intestate laws, the widow where there is issue may apply for an inquest, but she cannot take at the valuation. If the estate can be divided, so as to accommodate all the children and heirs, it must be divided, and a valuation put on each purpart; out of the whole valuation money, the widow is entitled to interest on the third part, during life. If the estate cannot

be divided, so as to accommodate all the heirs, the inquest must determine how many it will accommodate, and value each part. In the one case (where there is issue) the widow receives interest during life in money, in the other case, where there is a failure of issue, she is to have half in land not in quantity, but in value. If it were not so, the widow, having the right to the mansion house, might enjoy during her life much more in value, than half the estate. The mansion house might be worth \$5,000. The one hundred acres of land upon which it is situated worth \$50 an acre, making its value \$5,000. If she is entitled to half the land, without taking into consideration the value of the mansion house she would receive \$7,500, and the collateral heirs \$2,500. If this can be done, it seems to me the object of the Legislature would be defeated. Suppose, however, the one hundred acres of land, without the mansion house, is worth but \$2,500. How is partition to be made? She is entitled to the mansion house during life. Must she pay the collateral heirs the difference in valuation to equalize the shares into which it may be divided? The act makes no provision for a case of that kind. Partition in such a case could not be made, so as to give the widow one-half the value of the estate, and the collateral heirs the other half. If the estate was appraised, she would receive interest on the one-half the valuation, during life. By valuing the mansion house and the land, and giving her the benefit of one-half their value, she receives all that the Legislature intended she should have of her husband's real estate. If half the land, or its value, without taking into consideration the value of the mansion house, is given to her, the collateral heirs do not receive one-half the estate of the decedent. By the common law, the widow was endowable of one-third part of such estates of inheritance, whereof the husband was seized at the time of the marriage, and none other. This was extended by the statute of 9 Henry III., chap. 7, to all such lands as the husband was seized, at any time during coverture. If the lands and tenements were susceptible of division, a third part was to be allotted to the widow, by metes and bounds; if they could not be divided, she was still to be endowed in a special and certain manner, as if a mill, she shall have the third toll disk, or the whole mill, every third month, so she shall have the third part of the profits of a fair or office. She was entitled to be endowed, according to the value of the lands, at the time her husband's interest thereon ceased. In Pennsylvania, a widow where there is issue is entitled as at common law, to be endowed of one-third part in value. In some other of the States it is different.

McCutt's Estate, 6 P. F. Smith, 363, does not present the question raised in the case under consideration. There the estate could not be divided without prejudice. The widow filed

exceptions. 1st. That there being a widow and collateral heirs, the land should have been divided, giving to her the one equal half part thereof, including the mansion house, &c. 2d. There being a mansion house, &c., they should have been set apart, with one-half part of the real estate, to the widow. The exceptions were dismissed, and the Supreme Court said, it was only in case of actual partition of the land, the mansion house should be given to the widow. In that case the whole estate was valued at \$984, and was awarded to one of the collateral heirs, at her bid \$10 above the valuation. In distributing this sum, the widow would be entitled to only the interest on one-half the clear valuation money during life. The mansion house was included in the \$980, at which the whole was valued.

It is unnecessary to give an opinion on any exception but the first one, which was intended to raise the question, whether the mansion house must not be valued where the estate is susceptible of partition, and a purpart is assigned to the widow. I am of opinion the exception is a fatal one, and therefore set aside the inquest.

[Legal Gazette, Dec. 17, 1869, Vol. 1, p. 198.]

Court of Common Pleas, Northumberland County.

SUNBURY v. WILVERT.

1. In a mechanics' lien it is not necessary that the prothonotary should record upon the lien docket the bill of particulars.
2. Where the prothonotary recorded the whole statement, except the bills of particulars attached, in the mechanics' lien docket, with the entry "See bill of particulars filed." *Held*, That it was a sufficient compliance with the act of the 16th of June, 1836.

Sur motion to strike off municipal claim.

Opinion by JORDAN, P. J. Delivered March 17th, 1870.

The claim of the plaintiff filed in this case sets out very fully the acts of Assembly under and by virtue of which the work was done, by whom done, where done, and the amount claimed, and concludes thus: "And said claimant hereto annexes a bill of particulars of the amount of their claim, the nature and kind of work done, the kind and amount of materials furnished, and the time when the said work and materials were done and furnished, and the amount thereof." The whole statement, except the bill of particulars attached, was recorded in the mechanics' lien docket, and on the docket this entry was made by the prothonotary: "See bill of particulars filed." The non-recording of this bill of particulars on the lien docket is the ground upon which the motion to strike off the lien is founded.

It has certainly not been the practice in this county to re-

cord the bill of particulars, and if we decide in this case, that it is necessary, we must strike off a large number of liens that have remained on the record undisturbed for a number of years. This we are unwilling to do, unless compelled by some act of Assembly or decision of the Supreme Court requiring it, leaving us no discretion.

The act of 16th June, A. D. 1836, requires the prothonotary to procure and keep a book-docket, which shall be called the mechanics' lien docket, in which he shall cause to be entered and recorded all descriptions or designations of lots or pieces of ground as herein [therein] after mentioned, and all claims that may be filed by virtue of this act, together with the day of filing the same; and he shall cause the names as well of the owners of the lots or pieces of ground, as of the contractor, architect, or builder, if such be named, and of the persons claiming any lien under this act, to be alphabetically indexed therein. Subsequent sections of the act require that "every person entitled to such lien shall file a claim or statement of his demand in the office of the prothonotary, and such claim must set forth the names of the party claimant, and of the owner or reputed owner of the building, and also of the contractor, architect, or builder, the amount or sum claimed to be due, the nature and kind of work done, or the kind and amount of materials furnished, and the time when the materials were furnished, or the work was done." Unless a claim is filed within six months it is not a lien after that time. In *Knabb's Appeal*, 10 Barr, 188, Judge Bell, who delivered the opinion of the court, says: "The great object of its provisions (the act of 1836) is notice, by which purchasers and other lien-creditors may have some data by which in case of dispute they may be enabled to ascertain the truth. But all the cases agree that a substantial compliance is sufficient, and this is shown to exist whenever enough appears on the [record] face of the statement to point the way to successful inquiry." 2 Casey, 248, *Singerly v. Cawley*, was a case in which the claim omitted to state either the value of the work done, or the kind of materials furnished, and it was held to be incurably defective. 6 Barr, 187, *Noll v. Swinefruss*, was ruled in the same way, and for the same reason. In *Armstrong, et al. v. Hallowell*, 11 Casey, 485, the case of *Knabb's Appeal*, 10 Barr, 188, is affirmed as to the object or purpose of the lien docket—that is to give notice to purchasers and creditors, and that here they must look. The point decided in *Lawman's Appeal* 8 Barr, 473, is that a claim for materials, without specification of kind or quality, is bad. In the case we are considering we think there has been a substantial compliance with the acts of Assembly. The names of the parties were properly indexed in the mechanics' lien docket, the property is

particularly described, the amount claimed is set forth, and the bill of particulars is referred to. Who could be deceived? There were data sufficient to enable any one inquiring after liens against the property to ascertain them. There was quite enough in the record to point to a successful inquiry. A lien-creditor or purchaser, after examining the docket entry in this case and index, that would say the record on its face and index did not point the way to successful inquiry, would, to say the least of it, be considered as somewhat defective in vision as well as in understanding. Whatever puts a party on inquiry amounts to notice, and whenever the inquiry becomes a duty, as in case of purchasers and creditors, and would lead to a knowledge of the requisite fact, by the exercise of ordinary diligence and understanding it is sufficient. *Jacques v. Weeks*, 7 Watts, 267; *Hood v. Fahnstock*, 1 Barr, 470; *Epley v. Withcrow*, 7 Watts, 167.

The motion to strike off lien is denied, and the rule to show cause is discharged.

(Affirmed by Supreme Court, in *Wilvert et al. v. The Borough of Sunbury*, 3 Legal Gazette, 350.)

[Legal Gazette, April 22, 1870, Vol. 2, p. 122.]

NINTH JUDICIAL DISTRICT.

Composed of the Counties of Cumberland and Perry.

Court of Oyer and Terminer, Cumberland County.

COMMONWEALTH v. SCHOEPPPE.

STATEMENT OF THE CASE.

Miss Maria M. Stinnecke, an elderly lady, about sixty-five years of age, and a resident of Baltimore, died at Carlisle, Pennsylvania, upon the 29th of January, 1869, whilst on a visit to the latter place. Dr. Paul Schoeppe, who had been her medical attendant during her last illness was arrested upon the charge of having poisoned her, was indicted, tried and convicted of murder in the first degree. The trial commenced before Judge Graham, on Monday, May 24th, 1869, and lasted eleven days, the judge delivering his charge to the jury upon June 3d, 1869 (see page 434, *infra*). A verdict of guilty was rendered upon the last mentioned date. A motion was made for a new trial and duly argued. In the latter part of June, 1869, Judge Graham delivered an opinion (see page 450, *infra*), overruling the motion and thereupon pronounced sentence of death upon the prisoner. In the same month a special application for the allowance of a writ of error was

made to Chief Justice Thompson, and after a careful examination by him and Justices Read and Sharswood, of the exceptions and allegations of error presented, together with a report of the trial furnished by the counsel for the prisoner, the three judges saw no grounds for the allowance of a writ of error, and the allocator prayed for was therefore refused. Afterwards a writ of error was sued out by the prisoner, with the consent in writing, of the attorney general, and upon consideration the Supreme Court upon the 18th of February, 1870, decided that they had "nothing to do with the guilt or innocence of the prisoner," and that all they could do was "to say that we discover no error in the record." The judgment of the court below was affirmed.

(For the opinion of the court, see page 452, *infra*.)

Charge to the jury by GRAHAM, P. J. Delivered June 3d, 1869.

The prisoner at the bar, Paul Schoeppe, is indicted for the murder of Maria M. Stinnecke, by administering to her dangerous and poisonous drugs, on the 27th of January last.

The charge is one of most grave import, as murder is the highest grade of crime known to our criminal law, and involves the life of the defendant. The case, therefore, requires and doubtless will receive your deliberate and serious consideration.

On the indictment you may find the defendant guilty of murder of the first degree, of murder of the second degree, or of voluntary manslaughter. The definition of murder at common law is, "where a person of sound memory and discretion unlawfully kills any reasonable creature in being, and in the peace of the Commonwealth, with malice aforethought, either express or implied." In Pennsylvania murder at common law is of two grades or kinds—murder of the first and murder of the second degree. The act of 1794, re-enacted in 1860, provides, "that all murder which shall be perpetrated by means of poison, or lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery or burglary, shall be deemed murder of the first degree, and all other kinds of murder shall be deemed murder of the second degree; and the jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, ascertain in their verdict whether it be murder of the first or second degree."

Manslaughter is the unlawful killing of another, without malice, either express or implied. From the language of the act of Assembly, which we have read, you will see that murder perpetrated by poison is murder of the first degree, unless it is given through accident or mistake, and then it would not be a

criminal offence. But where poison is wilfully administered with the intention to kill, it is murder of the first degree, it is necessarily wilful, deliberate and premeditated, for the victim is selected, the means procured, the time and place to perpetrate the act appointed. To constitute murder in the first degree there must be an intention to kill, to constitute murder in the second degree the intention to kill must be wanting, and this is the distinguishing feature between the two grades of murder. Murder of the second degree is, where there is no intention to kill, but the death of another is caused in the commission of an unlawful act. Malice is implied from the unlawful nature of the act, or from the use of a dangerous weapon used in the heat of blood without sufficient provocation to reduce the grade of crime from murder to manslaughter, where there is no intention to kill. If an intention to kill existed at the time, the crime cannot be murder of the second degree. It will be either murder of the first degree or manslaughter. If you find death was caused by the prisoner by wilfully administering poisons to the deceased, with the intention to kill, this would be murder of the first degree. If poisonous medicines were given to the deceased by the prisoner, but not with intention of causing her death, then the prisoner may be guilty of manslaughter, or he may not be guilty of any crime, as we will explain to you in a subsequent part of our charge.

The commonwealth allege that the death of Miss Stinnecke was caused by dangerous and poisonous drugs, by prussic acid or by morphia, or the two combined, administered to her by the prisoner, with intent to destroy her life.

From the evidence it appears that Miss Stinnecke was an elderly lady, probably about sixty-five years of age, who resided in the city of Baltimore. She was possessed of a considerable estate, amounting to \$40,000. In the summer of 1868, she visited Carlisle, and was at Mrs. Woods, a distant relative. The office of Dr. Schoeppe was within a few doors of Mrs. Woods' residence, and the doctor and Miss Stinnecke became acquainted during that time. From the acquaintance formed at that time, Dr. Schoeppe addressed a letter to her after her return to Baltimore, which is dated 7th of November, 1868, stating that he could make an advantageous purchase of Dr. Herman's real estate and good will, if he could procure \$2,000, and other advantages he considered he would derive from the purchase. Miss Stinnecke returned again to Carlisle in November, and put up at Mr. Hannon's hotel. She left Mr. Hannon's and went to the Mansion House, kept by Mr. Burkholder, on the 19th of January, 1869. On the morning of the 27th of January (Wednesday) she was at breakfast, and on the street that morning, at bank after 9 o'clock, signed a check and re-

ceived the money. Mr. Smith, the teller of the bank, says she appeared in her usual state of health. On that day she was not at dinner. Mrs. Parker, a boarder at the house, states that she missed Miss Stinnecke at the dinner, and went to her room at 2 o'clock. She found her completely prostrated, and seemed very languid and very drowsy. Witness was not in her room again until Thursday morning, a little after 6 o'clock. Witness says she then found Miss Stinnecke lying insensible, breathing rather heavily. Thought her eyes a very little bit open in the morning, when she first saw her. Witness saw her again at 12 o'clock, her eyes were closed, and there seemed to be a perspiration on her face. She went back to Miss Stinnecke's room before 6 o'clock in the evening, and remained to her death. Witness further stated that deceased was lying on her left side, in an easy position. Her forehead and hands somewhat clammy, rather cold, was under the impression that they felt natural, and considered her under the influence of morphia, and when that went off she would be well. No unusual odor in the room, no odor of peach leaves or bitter almonds. No froth about her mouth. Her breathing did not amount to a snore, but made quite a noise. No distortion of features, nothing like convulsions. Her breathing not regular; apparently stops for a while; no rigidity of the muscles. Mrs. Parker states that she saw Dr. Schoeppe the day of Miss Stinnecke's death, and asked him why he gave her the vomit the day before, and he said he only gave her two grains of tartar emetic and ten of ipecac. Witness said Miss Stinnecke had told her that the doctor gave her something to make her sleep. That the doctor shook his head very much, and said, no! no! I did not give her anything to make her sleep.

Dolly Turner, a colored girl, and one of the chambermaids at the hotel, who attended to Miss Stinnecke's room, says, that Dr. Schoeppe came to see Miss Stinnecke pretty often. That he was there the morning she took sick, between 10 and 11 o'clock. He went into Miss Stinnecke's room, and called to witness to bring him a spoon. The doctor met her at the door, and took the spoon. After the doctor left, witness was called by Miss Stinnecke to empty her bucket. Miss Stinnecke said he had given her something to throw the heaviness off her chest. That she vomited after the doctor left. In the afternoon, at 3 o'clock, the doctor told witness Miss Stinnecke wanted a chambermaid. Witness went to her room door; Miss Stinnecke was lying on the bed; did not seem very ill. She went to her room again between 7 and 8 o'clock, and found her seeming to be very sick and sleepy; witness helped her out of bed, and to undress her, and when witness would not speak to her, would doze off, sitting on the chair. Witness next saw her at 6 o'clock

next morning, when she did not speak or move. Witness on cross-examination says she did not notice any unusual odor in the room, nor any frothing about the mouth.

Mrs. Shindle, who boarded at same house, states that she saw Miss Stinnecke at breakfast on the morning of the 27th; did not see her again until morning of 28th, when she saw her in her own room, between 7 and 8 o'clock, in an unconscious state, breathing quite heavily, her pulse strong, and a little quick. Her hands and forehead appeared moist, and in a natural condition. Before her death, witness states her breathing was long and heavy; not rapid and gasping; frequent intervals of a moment or so in her breathing; showed no convulsions, nor distortions of the features. Her tongue and mouth a little twisted to the left side, on which she was lying. No contraction or rigidity of hands or feet; no unusual odor; nothing like bitter almonds or peach leaves; no froth about the mouth, a little saliva escaping from it; eyes closed; no spasmodic contraction about the mouth. Mr. Lochman saw her on the morning of the 28th, about 7 o'clock; he remembers her as lying on her left side, insensible; breathing slow and labored; temperature of her body natural; skin moist; her hands warm and her feet cold; muscles seemed very much relaxed; mouth partly open; eyes closed; pulse natural, a little excited. Dr. Schoeppe was sent for between 8 and 9 o'clock: came up, as Mr. Rheem states, very much excited; went up to the bed, made some examination, and then said he must go for his stethoscope; he returned in a very short time. Upon further examination, said he would not take it upon his conscience to bleed, and said he would like to have Dr. Herman. Dr. Herman was sent for, and got to Miss Stinnecke's room about 11 o'clock; met Dr. Schoeppe there. Dr. Herman states that Dr. Schoeppe told him it was a case of hemi, or half palsy. Dr. Herman states the patient was lying inclined to her left side; he went to her bedside, felt both arms, and found no pulsation in either; he then drew her eyelids apart; found both eyes alike, a contracted state of the pupils. He told Dr. Schoeppe that he thought she was past bleeding, past taking remedies; he did not look upon it as hemiplegia; was puzzled to know what was wrong: had never seen hemiplegia in that condition before; when he opened the eye, it put him in mind of a hawk that was poisoned with a compound poison, and remarked that she was rather overdosed with medicine of some kind. The drugs given to the hawk were opium pills, or laudanum mixed with bread crumbs, prussic acid and corrosive sublimate; her symptoms indicated no natural disease, that he never saw a form of sickness like it before; could not tell the cause of her death. It was a singular form of sickness that he could not account for at all. Mrs.

Shindle, in her testimony, also states that Mr. Schoeppe told her on the 28th, the day Miss Stinnecke died, between 9 and 10 o'clock, that he had given her a vomit the day before, and when he returned about 12 o'clock, he found her very much prostrated. That he was in to see her several times in the afternoon, and in the evening between 8 and 9 o'clock. That at that time she was in her full senses, and spoke about the eclipse of the moon. That she asked him for something to put her to sleep, which he refused to give her, saying she was too weak. That she said she would take something herself, and he shook his finger at her, told her not to do so, and left the room.

Mr. Burkholder, the proprietor of the hotel, states that he went to Miss Stinnecke's room the night of the 27th, between 9 and 10 o'clock; the transom was open above the door; thinking she might want something, he called to her two or three times, and got no answer and left the room.

In connection with this evidence you will consider the testimony of Mrs. Horn, a witness called by the defendant. She was at the hotel at the time. She states that she was called by the chambermaid in the morning, and went into Miss Stinnecke's room about 7 o'clock, and found her in an unconscious state, lying with her mouth open and tongue drawn to one side, and breathing heavily. Witness says they were short breaths, not very short; her breathing was not natural; occasionally slight stoppage in her breathing. She was drawn somewhat to the left side, her eyes closed; her pulse not regular and weakened rapidly. Her feet both cold up above the instep, her left hand was cold, and not her right. In the afternoon witness says she noticed that she was in a profuse perspiration on her right side. The left hand was cold, her left side was not in a perspiration, it was her right side. Witness felt her skin on the right side, and said it appeared natural, felt her left hand and arm several times that day; did not feel any other part of the left side except the face. The left side of her face was cold, and the right side of her face was warm. You will also consider the statement of Mrs. Parker, Mrs. Shindle, Mr. Lochman, and Miss Comfort. Mrs. Parker states that both her hands were warm, and her face felt natural, with some perspiration on it. Mrs. Shindle says she felt her cheek and forehead, and her left hand several times through the day, and it was warm. Mr. Lochman says that at 7 o'clock in the morning, he felt both her hands and wrists, and they seemed to him of a uniform warmth. Miss Comfort, who laid her out, said she found after death, her entire body warm and moist, and her clothing covered with perspiration.

Wm. Drew, a colored man, and waiter at Mr. Hannon's hotel, where Miss Stinnecke boarded before she went to Mr. Burk-

holder's, a witness called by defendant, states that he waited on her at table at the time she boarded at Mr. Hannou's. That she complained a good deal of giddiness in the head. That she was a hearty eater, and would take little things from table to eat between meals. That he met her on the street the day before her death, between 10 and 11 o'clock. Asked her how she was; that she said she felt dull and bad; had been eating beefsteak the evening before, and was trying to walk it off.

We have stated the principal facts and circumstances in evidence in reference to her health and condition the day before her death, and her appearance and symptoms the day of her death, from 6 o'clock in the morning, when she was found unconscious and unable to move, and remaining in that situation until her death, at 6 o'clock, in the evening. No one, it appears, saw her from between 8 and 9 o'clock of the evening preceding her death, to 6 A. M.; of the day she died. The accounts of those who saw her last on the evening of the 27th are contradictory, and to our mind not easily reconcilable. Mrs. Parker says that on Wednesday afternoon she found her very drowsy. That witness and Mrs. Shindle offered to remain with her, but she refused to permit them. The chambermaid states between 7 and 8 o'clock in the evening, when she went to her room and assisted to undress and put her to bed, she found her seeming to be very sick and sleepy, and when the witness would not speak to her, she would dose off sitting on the chair, and witness would call her to arouse her. Mr. Burkholder states that between 9 and 10 o'clock of that night he went to her room, thinking she might stand in need of something. That the ventilator above the door was open, and he rapped at her door two or three times, and called to her two or three times and got no answer. But Mrs. Shindle says that Dr. Schoeppe told her he was at Miss Stinnecke's room the same night between 8 and 9 o'clock and at that time she was in her full senses, and spoke about the eclipse of the moon.

The body of deceased was taken to Baltimore on Friday after her death, accompanied by Mr. Rheem, a distant relative, and the defendant, who attended the funeral on Saturday. The body was disinterred, and a post mortem examination made on the 10th of February, thirteen days after her death. This examination was made by Dr. J. S. Conrad, resident physician of the Baltimore Infirmary, assisted by Dr. N. G. Ridgley. We deem it unnecessary to detail the minutiae of the post mortem. It has been minutely detailed by Dr. Conrad, and elaborately commented on by counsel. The brain, lungs, heart, liver, abdomen, chest, stomach, spleen and bowels were examined and found in a natural state, nothing indicating death from disease. Dr. Conrad says he did not examine the kidneys, because he

did not consider it necessary. Dr. Ridgley, who concurs with Dr. Conrad, that he found no cause from disease, no evidence of disease of the brain, did not examine the spinal marrow; some parts of the brain were softened.

We will here state that the theory of the commonwealth's counsel, as we understand it, is that death was caused by a compound poison of prussic acid and morphia, the system being first relaxed by administering tartar emetic.

To discover if possible the cause of death, the stomach and sections of the intestines were handed over to Prof. Aiken, who has been Professor of Chemistry and Pharmacy in the University of Maryland for thirty-two years. The professor detailed his chemical analysis minutely. He cut the stomach and intestines in small pieces, mingled them together, and divided the mass into two parts, one he used to ascertain whether there was any prussic acid. He added a proper quantity of water and a small quantity of sulphuric acid, and proceeded in the manner described by him to obtain by distillation a few ounces of liquid. He states that there are two modes of inquiry, to examine for the liquid, and to examine for the vapor prussic acid, either of which he would consider reliable; one is called the iron test, and the other the sulphur test. He pursued both these modes of inquiry, which resulted in procuring a faint trace of prussic acid; it satisfied him that it must have been present in the distillate or liquid produced by distillation. In connection with the evidence of Professor Aiken, you will consider that of Professor Himes, Professor of Chemistry in Dickinson College, and Professor Wormley, Professor of Chemistry in Capitol University, Columbus, Ohio. From the positions the three professors examined occupy, it may be presumed they are all gentlemen of eminence in their profession. The two latter, after hearing the evidence of Professor Aiken, do not concur with him in the opinion he has expressed from the chemical analysis made by him. There is another test mentioned by Professor Aiken, called the nitrate of silver test. This he did not apply, because he considered the results of the iron and sulphur tests entirely satisfactory. In this Professors Himes and Wormley do not concur. To arrive at that state of certainty required in cases of this kind, they consider the nitrate of silver test ought to be applied. In addition, they state that sulphuric acid being used in the substances, before distillation, would prevent any reliable result being obtained from the liquid produced by distillation. That there may be substances in the stomach harmless in themselves, which will produce prussic acid when sulphuric acid is used in the chemical tests, as it was by Prof. Aiken in this case. If you entertain from this conflict of evidence, a reasonable doubt

whether traces of prussic acid were found by Prof. Aiken in his chemical analysis, then you ought not to consider his evidence in determining the guilt or innocence of the prisoner, for it is incumbent on the Commonwealth to establish the guilt of defendant by a connected chain of facts and circumstances, each of which shall be sustained by evidence which satisfies the jurors beyond a reasonable doubt. So in reference to the post mortem examinations. If, from the evidence of Dr. Zitzer, Dr. Coudry, Dr. Robinson, or other medical witnesses, you consider that the post mortem examination as conducted and detailed in evidence by Dr. Conrad and Dr. Ridgley was incomplete and uncertain, and did not justify the opinion expressed by the doctors who conducted it, that there were no natural causes of death discoverable, then you ought not to consider this evidence, if you consider it doubtful and unreliable, in passing upon the question of guilt or innocence.

The defendant is not required to show the cause of death, or that it occurred from natural causes. He is not required to prove his innocence. This the law presumes until guilt is proved by the evidence of the commonwealth; nor is the commonwealth required to prove what kind of poison caused death, whether prussic acid, morphia, the two combined, or other poisons; but the evidence must satisfy you that death was caused by poisons or poisonous drugs of some kind administered by the defendant.

The defendant's counsel contend that from the evidence of the medical witnesses examined, death may have occurred from apoplexy, or from some disease of the kidneys; that the spinal marrow and the kidneys were not examined, and therefore there is no satisfactory evidence that death might not have been caused either by apoplexy or uremia—that is disease of the kidneys.

We consider it unnecessary to refer more particularly than we have done to the evidence, to show on the one hand that death was caused by poison, and on the other, to show the insufficiency of the evidence on the part of the prosecution to prove that death resulted from poison. The result of the chemical analysis by Prof. Aiken failing to detect the presence of morphia, and to show conclusively the presence of prussic acid, as stated by Profs. Himes and Wormley, is relied upon to show that there is no evidence of poison being detected in the body of the deceased, and in the absence of such evidence the defendant ought not to be convicted. On the contrary, the prosecution contend that even if there was a failure to detect the presence of prussic acid or morphia in the stomach of the deceased upon the chemical analysis, this does not establish the fact that death was not caused by prussic acid or morphia, on account of

the time that intervened between death and the chemical analysis. Miss Stinnecke died on the 28th of January. The body was disinterred on the 10th of February, thirteen days after death. The evidence of the medical witnesses and the medical writers referred to by counsel, appear to establish the fact, that from the unsubstantial and volatile nature of both prussic acid and morphia, cases have occurred where no trace of either could be found in the stomach or intestines, where a chemical examination was made in a shorter period of time after death than occurred in this case. The defence further contend that the symptoms in this case did not at all indicate that death was caused by prussic acid, and that the time that intervened before death, precludes the possibility of death from that cause. The symptoms described by the witnesses who were present during the day of her death do not correspond with those stated by the medical witnesses, as those which precede death from prussic acid. Miss Stinnecke, the witnesses describe, as lying in an unconscious, insensible state from 6 o'clock in the morning, when the chambermaid entered her room, until 6 o'clock in the evening, when she died. No spasms, no convulsions, no contraction of the muscles, all of which physicians state are the symptoms produced from the effects of prussic acid. And that its effects are violent and immediate, and generally cause death in from five to twenty or thirty minutes. But the commonwealth allege that death occurred not from prussic acid alone, but from the combined effects of prussic acid and morphia. We have no evidence of the symptoms that would result from the effects of those combined poisons. The books, Prof. Wormley says, are silent on this subject. But the same professor states in his work upon poisons, that the action of one poison may be modified by the presence of another, which is illustrated by the case of a person who took three grains of strychnine, one drachm of opium, and an indefinite quantity of quinine. Twelve hours afterward he complained of nothing serious, and survived forty hours after he had taken the mixture. If the action of one poison may be modified by the presence of another, and if strychnine, opium and quinine would not cause death in as short a time as the strychnine alone, then may it not be, that the symptoms produced from prussic acid alone, and the brief period within which death would ensue, would not be applicable to the effects produced by the combined poisons of prussic acid and morphia. You will also recollect that in this case there is no evidence that any one was in Miss Stinnecke's room from between 8 and 9 o'clock at night (when the defendant told Mrs. Shindle he was there), until 6 o'clock the next morning (a period of nine hours), to witness or describe her symptoms, after defendant's last visit to her room. As evidence to

establish that death was caused by unnatural causes, and not from disease, the commonwealth's counsel also refer to the opinions of Dr. Haldeman, Dr. Cornman, and Dr. Zeigler, given in answer to a question asked, as to their opinion of the cause of death, upon a hypothetical case submitted by the district attorney. Dr. Dale says he could not account for the combination of symptoms detailed in any other way than by opium, or some of its preparations. Dr. Haldeman says, from the results of the post-mortem examination, as spoken of by Dr. Conrad, he has no hesitancy in giving it as his opinion, that some cause or causes other than natural must have produced Miss Stinnecke's death. And from the testimony of Dr. Herman as to the symptoms manifested, which the witness details, he would naturally conclude, without personal observations, that the immediate cause of her death must have been owing to the free use of or administration of opium or some of its kindred preparations. In answer to the same question Dr. Cornman says, in predicated an opinion on the hypothesis detailed and the post-mortem appearances detailed by Dr. Conrad, I cannot conceive that the individual died from any natural cause, and that death must have resulted from some narcotic poison, either opium or some of its salts. Dr. Ziegler in answer to the same question, says, touching the question as detailed in that paper (the hypothetical case), it occurs to my mind that death must have resulted from some unnatural cause, from an injudicious or overdose of opium, or its preparations. Morphia is one of those preparations.

In addition to the opinions of the four physicians named, Dr. Kieffer, in answer to the same question propounded to Drs. Dale, Haldeman, Cornman and Ziegler, says, the negative proofs of her death are clear to my mind, but the positive data, whilst I believe they show clearly that the subject received both prussic acid and morphia, I cannot say unconditionally that they caused her death. To give an unconditional opinion I would want more positive evidence than we have.

Dr. Keiffer being again called to explain what he meant by an unconditional opinion, says, I meant by that, that whilst I believed from the facts detailed in the hypothetical case, that both prussic acid and morphia had been received, and that we had the evidence of their combined influence, and whilst I am familiar with the therapeutic action of morphia, and also have considerable experience with the action of prussic acid, yet, my experience and knowledge of the action of prussic acid is not such as to justify an unconditional opinion in the case, in the absence of chemical proof by analysis.

Dr. A. G. Herman, who saw the patient about 11 o'clock on the day of her death, says, according to the symptoms that he

saw in the subject, and the description of Dr. Conrad's post-mortem examination, he is led to believe that the compound poisoning of prussic acid and morphia, was the cause of her death.

When a hypothetical case is stated, and the opinion of a physician asked, it is for the jury to determine whether the facts and circumstances stated in the hypothetical case are proved to exist in the case trying, and if any fact or circumstance is stated that is not proved, or if the witness states any fact upon which his opinion is based, which is not proved to have existed, in the case on trial, then it is the duty of the jury to reject the answer of the witness, for it would not be proper and legal evidence.

If the evidence in this case satisfies you that the death of Miss Stinnecke was caused by poison, then another important inquiry arises, who is the guilty party? By whom was the poison administered? Was it by the defendant? In determining this question the following inquiries will naturally present themselves: Had the prisoner the poison in his possession? Had he opportunities for giving it to the deceased? and had he any motive for doing so? Dr. Worthington, a druggist of this town, states that some days before the 19th of January last, the defendant purchased from him a half ounce of diluted prussic acid, and that some time during the winter the prisoner got from him muriate of morphia, tincture of nux vomica, and Fowler's solution. Dr. Herron, a druggist of Harrisburg, if he is not mistaken in the identity of the prisoner, and he says that he is satisfied that defendant is the man, states that he sold to Dr. Schoeppe, about the 23d of January last, an ounce of diluted prussic acid. This would be but four days before it is alleged the poison was administered to Miss Stinnecke. That the defendant had opportunities to administer poison to the deceased during his several visits to her room, on the day and night of the 27th of January, appears to be clearly proved, for there is no evidence that any person was present in her room during these visits. But had he any motive in killing the deceased? This becomes an important inquiry, for it can scarcely be supposed that any person could be found so depraved as to murder this old lady without any motive for committing so horrible an act.

The prosecution, to show a motive for the act, have given in evidence a check dated the 27th of January, 1859, upon the Carlisle Deposit Bank, for \$50, which was presented at the counter by defendant, on the morning of the 29th of January, and the money paid to him. This check purports to be signed by Maria M. Stinnecke. Several witnesses have been called who were acquainted with the handwriting of the deceased, and

who say they do not believe it to be her signature. No witness is called to prove the signature genuine.

Another paper has been produced by the district attorney, purporting to be the last will and testament of Maria M. Stinnecke, dated the 3d of December, 1868. It was produced by defendant and his counsel, on the 1st of February, 1869, before Judge Daniels, of the Orphans' Court of Baltimore, as the will of deceased. The paper was filed in the office of the register of wills in Baltimore, on the 1st of February, 1869. This paper purports to be signed by Maria M. Stinnecke, and gives her "whole estate and property, whatsoever and wheresoever, to Paul F. Schoeppe, M. D., to his own use and benefit absolutely." The subscribing witnesses are Dr. Schoeppe, the defendant, who is the sole legatee, and F. Schoeppe, the father of defendant. The paper has been read to you without objection. F. Schoeppe, a subscribing witness, has not been called by the prosecution or the defendant to prove the execution of the paper, so that we have no evidence before us, except its production to prove that it is a genuine or false paper. It is also in proof by the two subscribing witnesses, that a will was executed by Maria M. Stinnecke, on the 17th of November, 1868, before she left Baltimore. This was sixteen days before the date of the paper in evidence purporting to be her will, and was found in her trunk. The paper was offered as evidence of motive to perpetrate the murder. That upon her death, if the paper of the 3d of December, 1868, could be established as decedent's will, the defendant would then come into possession of a large and valuable estate.

The important duty devolves upon you to ascertain and determine, from all the evidence in the case, whether the defendant wilfully caused the death of Maria M. Stinnecke by administering poison.

Should you upon a careful consideration and review of all the evidence in the case, find that the death of Miss Stinnecke was caused by prussic acid or hydrocyanic acid, or this in connection with other poisonous and deleterious drugs, or any other poisonous drugs, given to her by the prisoner, but not with the intention to kill, then a question may arise, in this aspect of the case, whether the prisoner is not guilty of manslaughter. It appears that the prisoner is a physician. Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. A lawyer does not undertake that his client shall gain his cause, nor does a physician undertake that he will cure his patient; nor does the law require that he shall use the highest possible degree of skill. There may be persons who have a more thorough education, superior mind, and the advantage of large experience, who might effect a cure,

when those not possessed of so much skill and experience might fail; but the law requires that he who undertakes to practice as a physician shall have a fair and reasonable degree of skill in the science he practices. If a party, having a competent degree of skill and knowledge makes an accidental mistake in the treatment of a patient, and death is the consequence, he is not guilty of manslaughter. If a person, totally ignorant of the science of medicine, administers a violent and dangerous remedy, or if he administers medicines of the nature of which he is ignorant, where proper medical assistance could, at the time, have been easily procured, and death ensues in consequence of the violent and dangerous remedy, or medicine, administered in ignorance of its nature and effect, the party would be guilty of manslaughter.

If a medical man of ordinary degree of skill in the science he practices, administers a violent and dangerous remedy with gross rashness, and without a due degree of caution; if he acts recklessly and without that circumspection and caution which a man of ordinary prudence would exercise; if it is administered with gross recklessness and wantonness, without that consideration of the consequences or the effect it might produce, which ordinary prudence and caution would require, under these circumstances, if death ensues in consequence of a dangerous remedy having been so administered, then the party would be guilty of manslaughter.

Applying the principles we have stated to the present case, if you find that Miss Stinnecke's death was caused by a violent and dangerous remedy administered to her by the prisoner, not with the intention of causing her death, but by an accidental mistake, then he would not be criminally responsible—he would not be answerable for any crime. On the contrary, if he gave the deceased violent and dangerous medicine, without a competent ordinary degree of skill in the science of medicine, but in gross ignorance of the nature and effect of the medicine administered, when proper medical assistance was at hand and could have been easily procured, then, under such circumstances, if death was caused by the medicine thus administered, the prisoner would be guilty of manslaughter. So too, if the prisoner, having competent skill and knowledge to practice as a physician, acted with gross rashness and recklessness, without that care and caution which a person of common or ordinary prudence would observe in administering violent and dangerous medicine, and death was caused by such rash and reckless conduct of the prisoner, under these circumstances he would be guilty of manslaughter.

The remarks just made are only applicable to this case, if you should come to the conclusion that the prisoner caused the

death of Miss Stinnecke without intending to do so; if, as we before said, he administered to her violent, dangerous or poisonous medicine, intending to cause her death, and death was the consequence, he would be guilty of murder in the first degree.

While the law is careful to prevent persons from tampering in physic so as to trifle with human life, it will not hold a person of general or ordinary skill in the science of medicine criminally responsible, although he has been unfortunate in a particular case, and made an accidental mistake in the treatment of his patient, which caused death. If, therefore, Dr. Schoeppe had a competent degree of skill and knowledge as a physician, but was unfortunate in his treatment of Miss Stinnecke, and made an accidental mistake in his mode of treatment, he would not be guilty of any criminal offence. And, as we before said, if you entertain a reasonable doubt whether the prisoner, by administering violent and dangerous medicine, caused the death of Miss Stinnecke, such reasonable doubt ought to produce an acquittal.

The evidence in this case is circumstantial, and not positive. No one saw the prisoner give to the decedent any drug or medicine, consequently all the evidence of guilt relied upon by the commonwealth to produce a conviction is circumstantial.

There is an opinion entertained by some, and which we occasionally hear expressed, that no one ought to be convicted of a capital crime on circumstantial evidence. This opinion is erroneous, and may arise from a misapprehension of the term. Circumstantial evidence may be quite as satisfactory and convincing, and in some cases more so, than positive evidence. Witnesses may be of doubtful character. They may swear positively to the fact of killing, and they may be perjured, or they may be honestly mistaken in the identity of the person; but where a chain of facts are sworn to by a number of witnesses of undoubted credibility, pointing with unerring certainty to the guilt of the accused, and irreconcilable with any reasonable hypothesis of innocence, this may be more satisfactory than the evidence of two or three witnesses, who swear positively to facts about which they may be mistaken, or designedly misrepresent the truth.

The late Chief Justice Gibson has said that he scarcely knew whether there was such a thing as evidence purely positive; and, to illustrate the fallacy of the opinion entertained by some, that no one ought to be convicted of a capital crime on circumstantial evidence, puts the following strong case: "You see a man discharge a gun at another, you see the flash, you hear the report, you see the person fall a lifeless corpse, and you infer from all those circumstances that there was a ball discharged from the gun, which entered the body and caused his death,

because such is the moral and natural cause of such an effect. But you did not see the ball leave the gun, pass through the air, and enter the body of the slain; and your testimony to the fact of killing is therefore only inferential—in other words, circumstantial. It is possible that no ball was in the gun; and we *infer* that there was only because we cannot account for the death on any other supposition.”

We might put another case of circumstantial evidence: two men are seen to enter a room alone, excited and quarrelling, the door is closed, and immediately the report of fire-arms is heard, the room is entered by others, and one is found with a pistol in his hand, just discharged; and the other upon the floor, in the agonies of death, with a ball through his brain. This too would be a case of circumstantial evidence. But we are strongly inclined to believe, that any man who could entertain a reasonable doubt of guilt, upon such evidence, although circumstantial, would be better fitted for a place in the lunatic asylum than a seat in the jury box. We have given these cases to correct the erroneous notion, should any exist in your minds, that no person ought to be convicted of crime on circumstantial evidence. If this idea is entertained and acted upon by juries, crime must necessarily escape punishment in many cases, and our citizens will have little protection from the violence of the lawless and the vicious.

But to justify a conviction in a criminal case, the evidence, whether positive or circumstantial, must satisfy the minds of the jury to a moral certainty, and beyond a reasonable doubt of the guilt of the accused.

“A reasonable doubt” is a term often used, probably generally well understood, but not easily defined. “A doubt, to work an acquittal, must be serious and substantial, not the mere possibility of a doubt,” because everything relating to human affairs, and depending on parol evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison of all the evidence leaves the minds of the jurors in that condition, that they cannot say they feel an abiding conviction, to a moral certainty, of the prisoner’s guilt. A doubt, which is caused solely by undue sensibility, in view of the consequences of a verdict, is not a reasonable doubt. But when all the facts on both sides have been fully examined, and every effort made to ascertain their precise character and bearing, any reasonable doubt, finally and permanently remaining on the mind, from whatever cause, will justify a juror in withholding his assent to a verdict of guilty.

The term “moral certainty,” is a quality or state of mental impression which it has been said is more easily conceived than defined. An eminent jurist has defined it thus: “A certainty

that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it." Again it is said to be "that degree of assurance which induces a man of sound mind to act without doubt upon the conclusions to which it leads." Another author says: "it is a state of impression produced by facts, in which a reasonable mind feels a sort of coercion or necessity to act in accordance with it; the conclusion presented being one which cannot, morally speaking, be avoided consistently with adherence to the truth."

You are not at liberty to disbelieve as jurors, if you believe as men; that is, your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered.

If you entertain no reasonable doubt, as we have explained it, of the prisoner's guilt, you ought to convict him. But if, either from want of satisfactory evidence of guilt on part of the commonwealth, or from a conflict between the evidence on part of the commonwealth and the defendant, you are not satisfied, to a moral certainty, and beyond a reasonable doubt, of his guilt, then the law requires you to acquit him.

We have said that upon the indictment you may convict the prisoner of murder of the first degree, or murder of the second degree, or of voluntary manslaughter.

Our opinion is that there is no evidence that would justify a conviction of murder of the second degree. If the prisoner willfully caused the death of Miss Stinnecke by poison, he would be guilty of murder of the first degree. If without intending to cause death, he administered dangerous, violent and poisonous medicines, with gross rashness and recklessness, as before stated, he would not be guilty of murder of the second degree, because malice would be wanting, which is essential to constitute that crime; but he would be guilty of voluntary manslaughter.

The prisoner is now, in the language of your oath, given to you in charge. His case is in your hands. Give it your very deliberate, calm and solemn consideration. Guard yourselves against any prejudices; give to the defendant the benefit of the presumption of innocence, until guilt is clearly proved, and of every rational doubt; and so discharge your duty to the commonwealth, to the defendant, and to yourselves, that you will enjoy the pleasant reflections of an approving conscience.

[Legal Gazette, Jan. 14, 1871, Vol. 2, p. 12.]

Court of Oyer and Terminer, Cumberland County.

COMMONWEALTH v. SCHOEPPLE

1. Granting new trials does not depend upon the whim or caprice of the judge, but upon well settled and fundamental principles of law, and, particularly in criminal cases, it cannot be granted to admit evidence merely cumulative or which was within the reach of the party applying on the first trial.
2. It will only be granted to let in evidence which would legitimately require a different verdict.

Sur motion for a rule for a new trial.

Opinion by GRAHAM, P. J. Delivered June, 1869.

We have listened attentively to the able arguments of the counsel for the prisoner, on the motion for a new trial. The reasons filed so far as they apply to the law as stated by the court to the jury in their charge, and answers to the points presented by the prisoner's counsel, have been stated, but not urgently insisted upon, because, as properly remarked, any error in law cannot prejudice the prisoner; it will be corrected by a superior tribunal, if any error exists.

But it is urged, with great earnestness, that the jury erred, and that the verdict of the jury is not justified by the evidence.

We will not review the mass of evidence in this case, but state the rules of law established by the Supreme Court in motions for new trials. In *Commonwealth v. Flanagan*, 7 W. & S. 421, Judge Rogers quotes the language of the late Chief Justice Gibson, as follows: "Motions for a new trial are to be received with caution, because there are few cases tried in which something new may not be hunted out, and because it leads very much to perjury to admit new evidence, after the party who has lost the verdict has had an opportunity of discovering his adversary's strength and his own weakness." To this Judge Rogers adds: "If this is to be feared in ordinary cases, when the right of property only is concerned, how much more must it be dreaded in a case such as the present, involving the life of a human being, and where such extraordinary means have been resorted to to save him from the perilous position in which he is unfortunately placed." * * * * "Cumulative evidence, by which is meant additional evidence to support the same point, or where it is of the same character as evidence already produced, is not sufficient to induce the court to grant a new trial." * * * "But aside from these objections, there are other reasons which in my mind are decisive against the

motion. Granting new trials does not depend on the whim or caprice of the judge, but upon well established and fundamental principles of law. In the trial of issues of fact, the court judges of the competency, the jury of the effect of the testimony. But after verdict, when the motion for a new trial is considered, the court must judge, not only of the competency, but of the effect of evidence. If, with the newly-discovered evidence before them, the jury ought not to come to the same conclusion, then a new trial may be granted; otherwise they are bound to refuse the application. And it is ruled that in considering the motion the court will not inquire whether, taking the newly-discovered testimony, in connection with that exhibited on the trial, a jury *might* be induced to give a different verdict; but whether the legitimate effect of such evidence would *require* a different verdict. The question, therefore, is, supposing all the testimony, new and old, before another jury, not whether it *might*, but whether it ought to give a different verdict. It is manifest, therefore, if these principles are correct, granting a new trial would be almost, if not quite, equivalent to a verdict of acquittal."

Applying these legal principles to the present case, the new evidence is entirely cumulative, and it is not after-discovered evidence, for it was as accessible to the prisoner before as after the trial; and we may further add, that a careful review of the evidence and the argument of the prisoner's counsel on the motion for a new trial, have failed to satisfy us that the verdict of the jury is not sustained by the evidence.

We therefore overrule the motion for a new trial.

The court then addressed the prisoner as follows:

"Paul Schœppe. After a patient and protracted trial before a jury of your own selection, and defended by able and zealous counsel, you have been found guilty of murder of the first degree.

Our laws require that the crime of wilful and deliberate murder be punished with death, and this is in accordance with the divine mandate which declares: 'That whosoever sheddeth man's blood by man shall his blood be shed.'

"We will not detail or recapitulate the evidence which satisfied the jury of your guilt, but the arguments of your learned and zealous counsel have failed to satisfy the court that the verdict was not justified by the evidence.

"You are a man of education and intelligence, and can fully appreciate and realize the position in which your crime has placed you, and we do not consider it necessary to address you in the language of admonition or warning.

"Your victim was Maria Stinnecke, an old lady of sixty-five years of age, friendless and unprotected, and at the time a

boarder in one of our hotels, who was possessed of an estate of about \$40,000. You gained her confidence so far as to correspond with her and obtain from her one thousand dollars. Emboldened by your success, you determined to possess her entire estate, and to effect your purpose you wrote a paper purporting to be the will of Maria Stinnecke, and purporting to be signed by her, in which you are the sole legatee, and to this paper your name and name of your father are attached as witnesses. That this paper is false and forged, cannot be doubted, for your father, who was examined as a witness by your counsel, was not even asked if the paper was genuine. But, to consummate your purpose, the death of Miss Stinnecke was necessary. This, the jury found by their verdict, you soon afterward effected by administering to her poison.

"The argument of your persuasive and eloquent counsel on the motion for a new trial having failed to satisfy the court that the verdict of the jury is not sustained by the evidence, it becomes our solemn but imperative duty to pronounce the sentence of the law upon you."

The court then pronounced the sentence of death.

[Legal Gazette, Sept. 3, 1869, Vol. 1, p. 73.]

Supreme Court of Pennsylvania.

SCHOEPPÉ v. COMMONWEALTH.

1. At common law no writ of error was allowed in criminal cases: the statute, West. 2, did not extend to them.
2. The revised code of 1860 allows writs of error to bring up exceptions to the decision of the court below on questions of law or evidence, or to its answer to a written point; but such writs must be granted by special *allocatur* of one of the judges of the Supreme Court on application made within thirty days after sentence pronounced.
3. It also allows a writ of error by consent of the attorney general, but this is simply a common law writ; upon it the Supreme Court cannot look into the evidence, or the charge of the court, or determine the guilt or innocence of the prisoner.

Error to the Oyer and Terminer of Cumberland county.

Opinion by READ, J. February 13th, 1870.

Maria M. Stinnecke died in Carlisle, in January, 1869. Dr. Paul Schoeppe, who had been her medical attendant during her last illness, was arrested upon the charge of having poisoned her, was indicted, tried and convicted of murder in the first degree. The trial commenced before Judge Graham, on Monday, May 24th, 1869, and lasted eleven days, terminating on Thursday, the 3d day of June, in a verdict of guilty. A motion was

made for a new trial, which was fully argued within the thirty days prescribed by the act of Assembly. A special application for the allowance of a writ of error was made to Chief Justice Thompson, and cause was shown, on behalf of the prisoner, on the 15th of the same month. After a careful examination of the exceptions and allegations of error presented, together with a report of the trial furnished by the counsel for the prisoner, participated in by Mr. Justice Read and Mr. Justice Sharswood, the three judges concurred in agreeing that they saw no grounds for the allowance of a writ of error, and the allocatur prayed for was therefore refused.

Since then a writ of error has been sued out by the prisoner, with the consent of the attorney general in writing, and certified on the said writ under the thirty-third section of the act of 31st March, 1860, relating to the penal proceedings and pleadings, which is but a re-enactment of the seventh section of the act of 13th April, 1791, and of the ninth section of the act of 16th June, 1836, relating to the jurisdiction and powers of the courts.

This section applies only to common-law writs of error in all criminal cases, and simply makes the consent of the attorney general equal to an allowance of the Supreme Court, or one of the justices thereof, and in no manner changes or affects the writ of error itself, as to what it brings judicially before the court, or the power of the court itself under it.

It remains simply a writ of error at common law.

Upon an application made during the previous session to fix a day for the hearing of this writ of error, we assigned the first Monday of February, and the argument was commenced on Tuesday and closed on Wednesday. The widest possible range was given to the counsel on both sides under a distinct declaration from the court that it was no pledge that the court should be in any manner bound or controlled by having heard any matters discussed which the court should eventually think either irrelevant or not within the scope of their powers as a court of error. At common law, both in England and Pennsylvania, no bills of exceptions were permitted in criminal cases, nor the rulings and opinions of the court to form any part of the record, nor were they ever seen or noticed in a court of error.

In *Middleton v. Commonwealth*, 2 Watts, 285, when upon the trial of an indictment for libel, evidence was rejected and the defendant's counsel requested the court to seal a bill of exceptions to their opinion, which was done. Chief Justice Gibson said: "It is not pretended that the judges were bound to read these bills of exceptions, but it is said that as they have voluntarily done so we are bound to inspect the matter supposed to

be thus put upon record." After showing that the statute of Westminster 2, did not extend to criminal trials, he said: "These bills of exceptions, therefore, being destitute of the sanction of the statute and are not judicially before us. Nor is this a defect in our system. At least, whatever it may seem in theory, it is not a defect in practice; for the recollection of no lawyer can point to an instance of injustice suffered or conviction procured by straining the law against the accused." On the 6th of November, 1856, an act was passed "allowing bills of exception and writs of error in criminal cases."

This act, with some alterations in form, and excluding its last two sections, is to be found in the 57th, 58th, 59th, 60th and 61st sections of the revised act of 31st March, 1860, relating to penal proceedings and proceedings and pleadings. By these sections provision is made that upon the trial of any indictment for murder or voluntary manslaughter, the defendant may except to any decision of the court, upon any point of evidence or law, which exception shall be noted by the court, and filed of record, as in civil cases, and a writ of error may be taken to the Supreme Court by the defendant after conviction and sentence.

It is made the duty of the court, upon any point submitted and stated in writing, to answer the same fully, and file the point and answer on the records of the case. No writ shall be allowed unless special application be made therefor, and cause shown within thirty days after sentence is pronounced. The application was made and cause shown within thirty days, and the writ was not allowed, but distinctly refused, and this closed the proceedings under the act of 1860.

This court in *Fife v. Commonwealth*, 5 Casey, 429, and in *Hopkins v. Commonwealth*, 14 Wright 9, held that under this act it was confined to exceptions taken on the trial to some question of law or evidence, or to the opinion of the court below upon a written point, which together with the decision must be filed with the records of the case. The revisers of the penal code say, "these sections are taken from the first, second, third, fourth and fifth sections of the act of 6th of November, 1856," and they have wisely and deliberately omitted the seventh section, which gave the defendant the right "to assign errors to the charge of the courts, as fully and with the same effect as if exceptions were taken to such charge when delivered to the jury."

The hearing, therefore, before us was upon a writ of error at common law, upon which no errors could be assigned but those which were apparent on the face of the record itself.

We could, therefore, not legally, or in our judicial capacities, look at the evidence, the bills of exceptions, and the charge of

the court, much less at the mass of extraneous matter pressed upon our attention.

We have nothing to do with the guilt or innocence of the prisoner, and all we can say is that we discover no error in the the record. Judgment affirmed, and records remitted.

[Legal Gazette, Feb. 1, 1870, Vol. 2, p. 54.]

Court of Quarter Sessions, Cumberland County.

COMMONWEALTH v. HARRIS.

1. In an indictment for bribery, an allegation that the accused did "offer and propose" to do a certain act is sufficient, as the "offer" to bribe is an "attempt" to do so, which attempt is a misdemeanor and indictable.
2. The object of the 11th section of the criminal code of 1860, is to remedy mere technical mistakes in the form of indictments, and the court may amend by permitting the use of words which legally import the offence, substantially charged.
3. Under the 6th article of the constitution of Pennsylvania, and the decisions of the Supreme Court, it is clear that a conviction for misbehavior in office requires the removal of the officer convicted, and that the court shall adjudge that he be removed from office.

Opinion by GRAHAM, P. J., delivered September 14th, 1871.

The defendant, John Harris, one of the county commissioners, was indicted and convicted, at August sessions last (1871), for attempting and offering to bribe John Gracy, a contractor with the county commissioners. This charge is substantially: that he, the said Harris, in consideration of \$50 to be paid him by the said John Gracy, offered to have certain unjust claims of said Gracy against said county, settled and paid and so adjusted that the county auditors should be deceived and cheated in the allowance of the payments as aforesaid to be made to the said John Gracy.

The 2d count in the indictment on which defendant was convicted, as found by the grand jury, is as follows:

"That the said John Harris, being then and there one of the commissioners of the county of Cumberland, duly elected and qualified as such, did, on the day and year aforesaid, in the county aforesaid, falsely, fraudulently and corruptly, in violation of his official duty, offer and propose to John Gracy, a contractor with said county commissioners, for the consideration of \$50, to be paid by the said John Gracy, to the said John Harris, for his own private use, to have certain unjust and other claims of the said John Gracy against the said county settled and paid, and so adjusted that the county auditors of said county, should be deceived and cheated into the allowance of the payments, so as aforesaid, to be made to the said John Gracy, in violation of the oath of office of the said John Harris and of his official duty, and to the

great wrong and injury of the said county, and against the peace and dignity of the commonwealth of Pennsylvania."

Before the jury were sworn, the commonwealth's counsel asked to amend the indictment by adding after the words "official duty" and before the words "offer and propose" the following words; "Did attempt to bribe and corrupt one John Gracy, a contractor with said county." The indictment was so amended by the clerk by order of the court, defendant excepted to the ruling of the court, permitting the amendment. (See amendment and order of court filed.)

The defendant then filed a general demurrer to the bill of indictment, the commonwealth filed a joinder to the demurrer. The demurrer was overruled by the court, and the defendant directed to plead to the indictment. The defendant excepted to the ruling of the court in overruling the demurrer, and directing defendant to plead to the indictment, and put in a plea of not guilty.

After trial and verdict, defendant's counsel moved the court to arrest the judgment for the following reasons filed:

1st. The count upon which the defendant is found guilty charges no offence, inasmuch as it merely sets out solicitation, and not any deed committed or done, and not any overt act in pursuance of such solicitation, and is vague, uncertain and contradictory.

2d. The powers of the court do not extend to matters of substance, but only to matters of form, in amending indictments under the criminal code.

3d. The official character of the defendant is not properly laid, and that he was elected by the duly qualified voters of the county.

Defendant's counsel rely upon the case of *Smith v. Commonwealth*, 4 P. F. Smith, 209, in which it is ruled that it is not indictable "to solicit, incite and endeavor to persuade" a married woman to commit fornication or adultery. And why is it not indictable? "Because," says Woodward, C. J., who delivered the opinion of the court, "so many equivocal words, looks and gestures might be construed into solicitation, that it would be difficult to define the crimes when dependent on such evidence. What expressions of face or *double entendres* of the tongue are to be adjudged solicitation? Is every cyprian who nods or winks to the married men she meets upon the sidewalk, indictable for soliciting to adultery? And could the law safely undertake to decide what recognitions on the street were chaste and what were lewd? It would be a dangerous and difficult rule of criminal law to administer." and again the chief justice remarks "the slightest reflection will persuade any observant man that a rule of law which should make mere

solicitation to fornication or adultery, indictable, would be an impracticable rule—one that in the present usages and manners of society, would lead to great abuses and oppressions. The morality of the law cannot undertake to regulate the thoughts and intents of the heart. The best it can do is to punish open acts of lewdness, and repress indecent assaults.”

The words in the indictment in the case cited were: “solicit, incite and endeavor to persuade.” In the present indictment, before it was amended, the words were “offer and propose.” In the case cited, Chief Justice Woodward says: “An *attempt* to commit a misdemeanor, is a misdemeanor, whether the offence is created by statute, or was an offence at common law.” Is an *offer* to bribe an *attempt* to bribe? What better evidence can there be of an attempt to bribe than an offer to do so? In what other way could the attempt be made than by an offer to bribe? According to the authority of approved lexicographers the words *offer* and *attempt* are convertible terms. Webster’s definition of the word *offer* is, 1st, “A proposal, to be accepted or rejected. 2d, First advance. 3d, The art of bidding a price or sum bid. 4th, *Attempt*, endeavor.” *Attempt* is thus defined: “To make an effort to effect some object, to make trial or experiment, to try, to endeavor, to use exertion for any purpose.” In the case of *Smith v. Commonwealth*, C. J. Woodward uses the following language: “In *Regina v. Martin*, 9 C. & P. 215, Justice Patterson hit the distinction, when he said; “It is perfectly clear that every *attempt*, not every *intention*, but every attempt to commit a misdemeanor is a misdemeanor.” In the *King v. Plympton*, 2d Lord Raymond, 1377, which was a case of attempted bribery—the offer of money to a member of a corporation for his vote. The court on a motion in arrest of judgment held that to bribe persons, either by giving money or promises is an offence for which an information will lie. In that case the information charged that “the defendant then and there, unlawfully and corruptly promised to pay,” &c. The word *attempt* or attempted, does not occur in the information.

In *Rex v. Vaughn*, 2 Burrows, 2497, the defendant attempted to bribe the Duke of Grafton, a cabinet minister, the bribe was offered by letter. In that case defendant’s counsel argued that it was mere solicitation, no act being done, in consequence of it. But Lord Mansfield said: “I am clear this is a misdemeanor and punishable as such.” “In many cases, especially in bribery at elections to Parliament, the attempt is a crime; it is complete on his side who offers it.

If offer and attempt are convertible terms, and if the attempt is complete on his side who offers the bribe, the charge in the indictment before amendment was an attempt and not solicitation.

That there were overt acts committed by the defendant, is clearly proved by the testimony of Mr. Gracy and Mr. Floyd, one of the county commissioners. Mr. Gracy proves that in pursuance of a letter received from the clerk of the commissioners, he went to Shippensburg to meet the commissioners, that he met only Mr. Harris. Mr. Harris said his business was to have him (Gracy) relinquish the contract he had for furnishing lumber for a county bridge, then in process of erection. Defendant said he was willing to give him all he could make, and he would even do more, that he would give him \$50 more than he claimed, so that he could give defendant and Mr. Floyd each \$25 back, as they were poor; said he wished Mr. Gracy to understand that he did not want him to pay a dollar of that he could make out of the bridge. Defendant further stated that he did not want Mr. Gracy to let Mr. Rhoads (the other commissioner) know anything about the arrangement.

Mr. Gracy told him that one commissioner could do no business, and he wanted a written agreement, signed by the commissioners. Defendant replied that he and Mr. Floyd would sign any contract he wished, and Mr. Gracy then arranged with him to come to Carlisle on the 22d of February, when defendant was to have a paper prepared for Mr. Gracy to look at.

Mr. Gracy further stated that defendant told him the \$50 could be arranged by putting so much on the stone work and so much on the filling up between the wing walls, and he thought in that way it would look better when the commissioner's accounts came before the auditors.

Mr. Gracy states that he came to Carlisle on the 21st of February, and met Mr. Harris at the court house. That Mr. Harris told witness Mr. Floyd had gone back on him, and refused to go into the arrangement. Mr. Floyd testifies that defendant told him after he (defendant) returned from Shippensburg, the offer he had made to Mr. Gracy, and that he (Mr. Floyd) would not agree to it. This evidence clearly shows overt acts on the part of defendant. The offer itself was an overt act, and it is immaterial whether the words used in the indictment are offer or attempt as they are convertible terms.

The second reason assigned in arrest of judgment is that the powers of the court do not extend to matters of substance, but only to matters of form in amending indictments under the criminal code.

If the defendant could have been convicted on the indictment as originally drawn, and if an offer to bribe where there are overt acts, is an indictable offence, the amendment was unnecessary, and could not prejudice the defendant. But, under the provisions of the criminal code, the amendment was properly permitted.

The 11th section of the criminal code of 1860, Purdon of 1861, place 11, provides that: "Every indictment shall be deemed and adjudged sufficient and good in law which charges the crime substantially in the language of the act of Assembly prohibiting the crime and prescribing the punishment, if any such there be, or if at common law so plainly that the nature of the offence charged may be easily understood by the jury. Every objection to any indictment for any formal defect, apparent on the face thereof, shall be taken by demurrer, or on motion to quash the indictment, before the jury shall be sworn and not afterward; and every court before whom such objection shall be taken for any formal defect, may, if it be thought necessary, cause the indictment to be forthwith amended, in such particular by the clerk or other officer of the court, and thereupon the trial shall proceed as if no such defect appeared." In the report of the commissioners to revise the penal code, they remark upon this section that—"the history of criminal administration abounds with instances in which the guilty have escaped by reason of the apparently unreasonable nicety required in indictments. Lord Hale remarked that 'such niceties were grown to be a blemish and inconvenience in the law, and the administration thereof; that more offenders escaped by the easy ear given to exceptions to indictments, than by the manifestations of their innocence; and that the grossest crimes had gone unpunished by reason of these unseemly niceties.' The reason for recognizing these *subtleties* by the common law, no doubt arose from the humanity of the judges, who in administering a system in which the punishment of death followed almost every conviction of felony, were naturally disposed in favor of life, to hold the crown to the strictest rules. Since, however, the reform of the penal laws, and the just apportionment of punishment to crimes, according to their intrinsic atrocity and danger, the reason which led to the adoption of these technical niceties has ceased, and with the cessation of the reason the technicalities themselves should be expunged from our system." These remarks clearly show the mind and intention of the commissioners in reporting this section which is new to our criminal code, that every indictment which charges a common law offence shall be deemed and adjudged sufficient and good in law; where the crime is charged so plainly that the nature of the offence charged may be easily understood by the jury. That all nice technicalities should be expunged from our system, when the offence is charged so as to be easily understood by the jury. Although not in proper legal form, the court, before whom objection should be taken to the form of words in which the offence is charged, may, if necessary, cause the indictment to be amended. The court cannot sub-

stantially change the nature of the charge. It cannot introduce a new and different offence; but where the crime is so plainly charged as to be easily understood by the jury, the court may amend by permitting the use of words which legally import the offence substantially charged. If this is not the meaning of the section, it is entirely inoperative, and effects no change in the law. Where the offence is charged in proper form, no amendment is necessary. Where it is defectively charged, if the defect in language cannot be amended so as to describe the crime in apt and appropriate words, then the commissioners who revised the penal code have entirely failed in their intentions, which was to avoid "technical niceties," and to expunge them from our system in administering criminal law. If when the word *offer* is used in an indictment it cannot be amended by adding the word *attempt*, then we have not advanced our criminal jurisprudence beyond the time of Lord Hale, who complained that the grossest crime had gone unpunished by reason of these unseemly niceties.

The third and last reason assigned in arrest of judgment is that: "The official character of the defendant is not properly laid, and that he was elected by the duly qualified voters of the county."

The indictment charges that John Harris, commissioner, &c., being one of the county commissioners of said county, duly elected and qualified as such, did, &c. In *Elge v Commonwealth*, 7 Barr, 275, which was an indictment against supervisors of the township, it was laid in the indictment that the defendants were duly elected by the qualified voters of East Caln township, and took upon themselves the office of supervisors. The indictment in this case concludes: "In violation of the oath of office of the said John Harris and of his official duty," &c.

Defendant's counsel contended that it is not averred that he was duly elected *by the qualified voters of the county*; but it is averred that he was one of the county commissioners of said county, duly elected and qualified. This objection is purely technical and not tenable. If defendant was duly elected he must have been elected by the qualified voters of the county—for duly elected means legally elected.

The motion in arrest of judgment is overruled, and judgment entered against the defendant.

The motion in arrest of judgment being overruled, the question arises whether the conviction of misbehavior in office requires or justifies a removal.

At common law bribing in a judge, in relation to a cause pending before him, was looked upon as a very high offence, and punishable, not only with forfeiture of the offender's office,

but also with fine and imprisonment. But all other forms of bribery are misdemeanors, to be visited with imprisonment and fine. 2. Bishop on Criminal Law, 98. And offering a bribe, though not taken, is punished in the same way. 4 Bl. Com. 140. So that at common law, the defendant could only be punished by fine or imprisonment, and not by removal from office. But the constitution of Pennsylvania has changed the common law on this subject. The 9th section of the 6th article is as follows: "All officers for a term of years, shall hold their offices the terms respectively specified, only on the condition that they so long behave themselves well, and shall be removed on conviction of *misbehavior in office*, or of any infamous crime. This section of the constitution was before the Supreme Court of our State, in *Com. v. Shaver*, 3 W. & S. 338. In that case, Kennedy, J., who delivered the opinion of the court, remarked as follows: "The point to be decided in this case arises out of the 9th section of the 6th article of the constitution of this State, which is in the following words." The judge then quotes the above article and continues: "It is very clear that sheriffs, as well as all other officers holding their respective offices for a term of years only, are embraced within the provision of the constitution, so that the respondent, though duly elected and commissioned to the office of sheriff, cannot claim to hold it after he has been *convicted of misbehavior in it*, or of any infamous crime."

From the foregoing provision of the constitution, and the adjudication of the Supreme Court of our State, it is very clear that the conviction of defendant of misbehavior in office requires his removal from the office of county commissioner, and that the court shall adjudge that he be removed from office.

The court sentenced the defendant to pay a fine of one hundred and ninety-five dollars and the costs of prosecution; and that he stand committed till the sentence is complied with. And the court adjudge and decree that the said John Harris be, and he is hereby removed from the office of county commissioner of Cumberland county.

[Legal Gazette, Sept. 29, 1871, Vol. 3, p. 308.]

ELEVENTH JUDICIAL DISTRICT.

Composed of the County of Luzerne.

Court of Common Pleas.

NIVER v. PERIGO.

1. Under the law of Pennsylvania, a subsequent owner and occupier is liable for a former owner, who has neglected to pay his taxes for even two years previous, and the personal property of such subsequent owner may be distrained on for such unpaid taxes by collectors during the lifetime of their warrants, and the subsequent owner is left to his action for reimbursement against the owner of the land at the time such taxes were assessed.
2. The construction of the 46th section of the act of April 15th, 1834, as given in *Henry v. Horstiek* 9 Watts, 412, and reiterated in subsequent cases, reviewed, and criticized.
3. A distinction is recognized between taxes assessed against an owner and occupier in the beginning of a year, and taxes levied on the same property during another part of the same year, while it is occupied by the *vendee* of such former owner. In such case, the former owner is liable over to the subsequent owner, who has been forced to pay taxes assessed and levied during such prior ownership; but he is not so liable for taxes actually levied against the same property, in his own name, subsequent to his ownership and occupancy.
4. An *assessment* is not for all purposes a *levy* of taxes. The former is a valuation, for the purpose of fixing the proportion which each owner shall pay, the latter is the act of imposing the proportion thus fixed, that it may be collected for public use.

Opinion by HARDING, P. J. Delivered April 17th, 1871.

This is an appeal by the defendant from the judgment of Joseph Chase, Esq., one of the justices of the peace for the county of Luzerne. The facts have been agreed upon by the counsel for the parties; and the matter is now before us in the nature of a case stated.

The facts as agreed upon are, that on the 29th day of January, 1867, George Perigo, the defendant, conveyed to John Niver, the plaintiff, a certain hotel property in the township of Nicholson, Wyoming county, by deed of general warranty, for the consideration of four thousand dollars; that the assessment of said property in the year 1866 for the taxes of 1867, was made against George Perigo; that the State and county taxes on this property for Wyoming county for the year 1867, were levied in January, 1867, and amounted to \$17.34; that the road tax was levied on the first day of April, 1867, and amounted to \$8.64; that the school tax for the school year of 1867, was levied in June of that year, and amounted to \$17.77; that John Niver, the plaintiff, moved on the property with his goods and chattels in March, 1867; that when the collectors demanded these several taxes during the year 1867, the defendant, George Perigo, had no personal property on the premises; and that in order to avoid the making of a distress on the goods and chattels of the plaintiff, John Niver, by the said

collectors, he paid to them, under protest, the several sums above mentioned, amounting in the aggregate to \$48.75.

The further fact is also stated, namely, that the assessment made against George Perigo, the defendant, for Nicholson township, Wyoming county, for the year 1866, and which constituted the basis for the tax levies of 1867, is as follows:

One house and lot, valuation	\$500
One outhouse "	100
Two horses "	100
One cow "	16
Occupation innkeeper	50
	<hr/>
	\$766

The case concludes with the usual agreement on the part of counsel, that if the court shall be of opinion that George Perigo, the defendant, is liable over to John Niver, the plaintiff, for these taxes, or any part of the same, then judgment is to be entered for the plaintiff accordingly, with interest; to be computed on the several sums of taxes as they were respectively paid by the plaintiff, thus, road tax, \$8.64, paid May 20th, 1867; State and county taxes, \$17.34, paid November 18th, 1867; school tax, \$17.77, paid February 11th, 1868; either party reserving the right to take a writ of error.

While there are some facts contained in the statement of the case, which we do not regard as material, yet, taken as a whole, it substantially raises the two great points of the controversy, which are all we are called upon to decide, and to which only we shall direct our attention.

The first of these is: Were the goods and chattels of John Niver liable to be distrained on for these taxes? And second, having paid the taxes, can he recover the amount thereof in the present action from George Perigo?

We are not unmindful of the fact, that the books to which both lawyers and judges are accustomed to refer as authority, contain very much upon the questions under consideration which is not altogether harmonious, indeed, which is little less than positively conflicting. A careful examination of the cases, however, enables us to deduce from them the law as it now stands, and which must rule the case before us.

Taking up the cases chronologically, so far as they bear directly upon the questions, we find that in 1825, Chief Justice Tilghman delivered the opinion of the court in *Scott v. Quinn* 12 S. & R. 299, wherein it was held, that "The person who in the begining of the year is charged with the taxes is liable for the whole year," and thereupon a judgment of the Court of Common Pleas of Philadelphia county, in favor of a subsequent

owner for the taxes which he had been compelled to pay for a former owner, was reversed. This seems to have been the law, until the 46th section of the act of April 15th, 1834, Purdon, 943, as construed by Judge Kennedy in 1840, in *Henry v. Horstick*, 9 Watts, 412, inaugurated a reverse doctrine. In other words, the Supreme Court there held, that "The goods and chattels of a tenant in possession are liable to be distrained on for the taxes assessed on the land before he took possession, or became the owner."

While we bow with respectful deference to the ruling thus laid down, and shall give to it our unqualified adhesion as long as it bears its present badge of authority, yet we should do violence to our convictions if we suffered the present occasion to pass without expressing our astonishment at the extraordinary and, to us, unwarrantable liberty with which the plain, unambiguous language of a statute was treated in arriving at the conclusion referred to.

The words of the section are as follows:

"The goods and chattels of any person occupying any real estate shall be liable to distress and sale for the non payment of any taxes assessed upon such real estate *during his possession or occupancy*, and remaining unpaid, in like manner as if they were the goods and chattels of the owner of such real estate."

The legislative design is here clearly manifest.

The language can hardly admit a reasonable question. A specific purpose was announced, namely, to make those occupying lands by permission or sufferance of the owner—and there are multitudes of such in the commonwealth—or in privity with him, *liable as the owner*; and hence the *limit* of such liability for "taxes assessed upon such real estate *during his possession or occupancy*."

The rule then would be, that the goods and chattels of any occupier of land would be liable to be distrained on for taxes assessed *during such occupancy*; but not that such liability would extend back for taxes which had been assessed during the occupancy of another, and, probably, a stranger at that. The recognition of any other construction by the courts, seems to us to involve the indulgence of liberties amounting to *making* rather than *expounding* the law.

If it had been the intention of the Legislature to make a *subsequent* owner, and occupier liable for a *former* owner, who had neglected to pay his taxes, the phraseology of the 46th section of the act of April 15th, 1834, as we think, would have been as follows: "The goods and chattels of any person occupying any real estate *shall be liable during his possession or occupancy* to distress and sale for non-payment of any taxes assessed upon such

real estate and remaining unpaid, in like manner as if they were the goods and chattels of the owner of such real estate."

Entertaining, as we do, these views upon the construction of the statute, and dissenting from the doctrine based on *Henry v. Horstick*, we should have ruled the present case in accordance with *Scott v. Whitely et al.*, 3 P. L. J. 361, where in 1842, it was held that, "Under the 46th section of the act of 15th April, 1834, one owner of land is not liable for a former owner who has neglected to pay his taxes thereon." In delivering that judgment, Judge Ewing very pertinently says: "The decision of the case of *Henry v. Horstick*, did not require the expression of the opinion. It was a suit brought by the purchaser, after having paid the tax, against the administrator of the deceased. He could not, of course, recover; for whether the payment were voluntary or compulsory, the administrator not being liable *as such*, could not be compelled to pay. The opinion on the construction of the act of Assembly was, therefore, extrajudicial."

This reasoning, however bold, did not prevail further than the case which called it out; for in 1846, in *McGregor v. Montgomery*, 4 Barr, 237, a case having analogies as well with *Henry v. Horstick* as *Scott v. Whitely*, the Supreme Court advanced even ahead of their former ruling, and adjudged that, "The property of an occupier of land may be seized under a distress for taxes, although it be not on the premises."

And in 1849, in *Caldwell v. Moore*, 1 Jones, 58, the judgment of the court was predicated on *Henry v. Horstick*; the doctrine of that case was substantially reiterated; the 46th section of the act of April 15th, 1834, was again construed; and by that construction it was established as the law in Pennsylvania, that a subsequent owner and occupier is liable for a former owner, who has neglected to pay his taxes for even two years previous; and the personal property of such subsequent owner may be distrained on for such unpaid taxes, by collectors during the lifetime of their warrants, respectively; thus leaving the subsequent owner and occupier to this action for reimbursement against the owner of the lands at the time such taxes were assessed.

The fountain head of this stream of authority is *Henry v. Horstick*. It was struck by accident; and that, too, when the occasion required no such discovery. In *Miller et al. v. Gorman & Preston*, 2 Wright, 309, Judge Woodward says, that "the 46th section of the act of April 15th, 1834, subjects the goods of tenants in possession of real estate to distress and sale for non-payment of taxes assessed upon such real estate;" therein giving the only intimation contained in any case since 1840, that the Supreme Court recognized any other construction of the section referred to than that promulgated in *Henry v. Horstick*;

but as the point now under consideration was not raised in that case, and as the same rule necessarily resulted from the provisions of the 6th section of the act of April 3d, 1804. Purdon, 991, the law, as we have before stated it, was left unimpugned.

It must not be overlooked, however, that this doctrine applies only in its whole extent to such taxes as have been actually assessed during the occupancy of a former owner; and that a distinction must be observed where certain taxes have been assessed against an owner and occupier for a part of a year, and certain other taxes which have been assessed on the same property for another part of the same year, and while such property was in the occupancy of the vendee of such first owner and occupier. This distinction must be applied in the present case.

By the terms of the case stated, we must assume that the State and county taxes for 1867 had been already assessed on this property when George Perigo conveyed it to John Niver; but the road tax had not, nor had the school tax. The former of these was levied on the first of April, 1837, and the latter in June following. Both of them, therefore, were levied after Niver had purchased the property, and had entered into possession of it; and so far as the real estate itself was concerned, the road and school taxes thereon for that year, he ought, upon every principle of justice, to pay.

It was the blunder of the supervisors in the one instance, and the carelessness of the school board in the other, that these taxes were ever assessed against George Perigo at all. But having been thus assessed, and Niver having paid them, though they constituted his own debt, and though their payment was not voluntary, shall he be permitted under the forms of law to reimburse himself out of Perigo? In other words, is there any law whereby one man, who has been compelled to pay his own debt, shall be permitted the next day to collect it out of his neighbor?

We hold that not even the tax laws of this commonwealth contemplate any such anomaly. In *Scott v. Quinn*, 12 S. & R. 299, the principle, as we have before stated, "that taxes on real estate cannot be apportioned among the different persons who may become owners of it during the year; and that the person charged at the beginning of the year is liable for the taxes of the whole year," was laid down, and is authority to-day. But an examination of that case will show a vital difference existing between it and the one before us. There, the taxes had been actually laid before the conveyance; here, excepting the State and county taxes, the remaining taxes for the year had not been laid before the conveyance. The former owner and occupier in that case, in the absence of any bargain with his

vendee to the contrary, would have been held liable for the taxes of the whole year laid during his ownership; and thus far, and no farther, will we hold the rule in the present case.

With regard to the road taxes, amounting to \$8.64, paid by Niver, and which he seeks now to recover against Perigo, the law is entirely clear.

The 33d section of the act of April 15th, 1834, directs that "the supervisors and overseer of the poor of every township shall cause fair duplicates to be made of the rates or assessments by them respectively laid, which shall be signed by them respectively, and shall issue their warrants with such duplicates, to the collector of such rates and levies, therein authorizing and requiring him to demand and receive from every person in such duplicate named, the sum wherewith such person stands charged;" provided, the 34th section goes on to say, "that before issuing the duplicate and warrant for the collection of road taxes, it shall be the duty of the supervisors of every township to give notice to all persons rated for such taxes, by advertisements or otherwise, to attend at such times and places as such supervisors may direct, so as to give such persons full opportunity to work out their respective taxes." In *Miller et al. v. Gorman & Preston*, 2 Wr. 309, before referred to, it was held, that "the opportunity to work out the taxes, is a condition precedent to the issuing of a warrant for their collection."

The case stated does not affirmatively show that this positively essential duty had been performed by the supervisors before they issued their warrants for the collection of this particular road tax. Indeed it is not an unwarrantable presumption that they followed the example of too many of our supervisors, who are more anxious for the money than they are for the work; and who spend more time in watching for the products of their warrants than they do in overseeing the workings of the plow and scraper in our public highways.

The payment of this tax, therefore, by Niver, can in no sense be regarded otherwise than voluntary; and, hence, not recoverable out of Perigo. Even though the violation upon which it was based, was predicated in part upon personal property belonging to Perigo, namely, "two horses, valuation \$100; one cow, valuation \$16; occupation, \$50;" still, when he paid it, under protest, and with the fears of a collector's warrant hanging over him, such payment in the eye of the law, was, nevertheless, voluntary, for the collector's warrant was void *ab initio*.

The school tax embraced in the case stated, and amounting to \$17.77, stands in a somewhat different attitude. The 29th section of the act of May 8th, 1854, P. L. 624, provides "That for the purpose of enabling the board of directors or controllers to assess and apportion the tax for the ensuing school year, the

county commissioners shall, when required, furnish the president or secretary of the board with a copy of the last adjusted valuation of proper subjects and things made taxable in the same, for State and county purposes, which said property, subjects and things are hereby made taxable for school purposes, according to the provision of this act." A copy of the assessment, after the same has been corrected by the commissioners, according to the provision of the general tax laws, becomes, therefore, the sole and only basis on which the school board is authorized to levy the taxes for the ensuing school year. Unlike the proper officers who levy other township taxes, the school board cannot call to their assistance the assessor, and thus correct any remaining errors which the commissioners may have overlooked; but they are restricted to a copy of the assessment, which has been furnished to them according to the directions of the statute. Most of our tax laws entitle the citizens to an appeal, not to a judicial hearing, but to an appeal to some special tribunal, generally the county commissioners. The school law gives no such appeal. *Wharton et al. v. School Directors*, 6 Wr. 358.

Under the law, therefore, the school directors of Nicholson township, Wyoming county, having received from the county commissioners a copy of the assessment, on which the name of George Perigo appeared, in 1867, with a valuation of his property, as set forth in the case stated, and having in June of that year assessed him with a tax amounting to \$17.77, unquestionably the right to issue a warrant for its collection followed as a matter of course. And the tax being a personal charge against him, if he refused to pay it and had not sufficient personal property out of which to enforce its collection, the collector would have been authorized in taking his body in execution. True, under the peculiar circumstances of the case, he *might* have invoked the equity side of the court, and thus restrained the school board from levying and collecting the tax, provided he could have satisfied the court that the board were about to commit or were committing an act "contrary to law" and prejudicial to his rights as an individual; but, in the absence of any such proceedings on his part, the power of the collector's warrant would have been laid upon him. It does not necessarily follow that because this tax could have been collected out of Perigo, therefore Niver having paid it, under protest, ought to recover it back in the present action. We have shown already that, not having been assessed while Perigo was the owner and occupier of the property, it did not fall within the rule laid down in *Scott v. Quinn*; *Henry v. Horstick*; *McGregor v. Montgomery*; *Caldwell v. Moore*, and *Allentown v. Saegar*.

As between the plaintiff and defendant here, the property of

the former was threatened with a distress for the nonpayment of *his own taxes*, which had, through a technicality of the law, been wrongfully assessed against the latter; he pays them finally, under protest, and institutes this action against the latter, claiming that, under a further technicality, he may and ought to recover. It cannot be denied that the sum of the school tax was in part made up from a valuation of property belonging to Perigo; not real estate, but personal property.

So far as the real estate constituted a basis, Niver was debtor for the taxes; but as far as the personal property and occupation entered into the valuation, Perigo was debtor. Under such circumstances the law will adjust the rights of the parties upon the principles of common honesty. If, therefore, upon a total valuation of \$766, made up of Niver's real estate and outhouse, \$600, and Perigo's personal property and "occupation," \$166, a levy for school purposes were made, amounting to \$17.77, for the school year of 1867, it is arithmetically certain that \$13.92 represented the real estate and outhouse which were owned and occupied by Niver *when the tax was laid*, and \$3.85 represented the personal property and "occupation" of Perigo when the valuation was fixed by the commissioners. In *Wells v. Smith et al.* 5 P. F. Smith, 159, it was held, that "the taxable or his property is assessed when the assessor has returned his list of property and valuation and the commissioners have apportioned the rate per cent. on the several townships." But this applies only to unseated lands, which, *as such*, are made debtor for the taxes. It does not apply to seated lands and personal property, which may be subsequently rated with the township taxes by the proper township officers. And herein it is proper to observe, that an "assessment," as made by township assessors and subsequently supervised and corrected by the county commissioners, is not, for all purposes, a *levy* of taxes. That assessment is a *valuation* of property for the purpose of fixing the proportion which each man shall pay; while a *levy* is the act of imposing such proportion thus fixed, that the same be collected for public use. The latter, so far as relates to township taxes, is necessarily subsequent to the former.

In disposing of the present case, we do not assume "to apportion the taxes on *real estate* among the different persons who have become owners of it during the year." On the contrary, we leave the *real estate taxes* where *Shaw v. Quinn* left them, to be collected as in *Henry v. Horstick*; but the school taxes we apportion upon the basis of the ownership of the property on which they were levied. If this can be done with certainty, then justice requires it should be done. It is a maxim of the law "That is certain which can be made certain." The arithmetical formula before indicated, reaches that result. Judgment

is here ordered to be entered in the case stated, in favor of the plaintiff and against the defendant for \$25.43, being for the whole amount of the State and county taxes, and the proper proportionate amount of the school taxes, with interest on the sums, respectively, from their several times of payment to this date.

S. S. Winchester, Esq., for plaintiff.

W. G. Ward, Esq., for defendant.

[Legal Gazette, May 26, 1871, Vol. 3, p. 162.]

Court of Common Pleas, Luzerne County.

IN EQUITY.

EVERETT v. STEELE et al.

1. The capital stock of national banks is liable to taxation for county purposes.
2. The exemption of mortgages, judgments, and other modes of moneyed investment in particular counties, they being taxable throughout the State generally, does not relieve national bank stock from county taxation.
3. It is liable to assessment at its actual or current value.

Opinion by E. L. DANA, Add. L. J.

The plaintiff complains that one hundred and fifty shares owned by him of the capital stock of the Second National Bank of Wilkes-Barre, of the par value of \$15,700, were assessed on or about the 5th of March, 1870, at the valuation of \$18,212; that such assessment was without authority of law and at a greater rate than was then or is now assessed or imposed upon other moneyed capital in the hands of individual citizens of the State. That the defendants, Louder, Hill and Bailey, as commissioners of Luzerne county, have levied upon the aforesaid valuation, a county tax of eight mills upon the dollar, for the year 1870, and have placed in the hands of John Steele, the other defendant, a duplicate with a warrant attached for the collection of this tax, who threatens, if payment be not made, to enforce the same by the sale of plaintiff's stock; and that under the 4th section of the act of Assembly, of 31st March, 1870, P. L. 42, the said Second National Bank of Wilkes-Barre, before the 20th of January, 1871, elected to pay, and paid into the State treasury, a tax of one *per centum* upon the par value of all the shares of the said bank; that the auditor general applied this payment to the taxes of 1871, without consultation with said bank, and that afterwards the auditor general collected from the bank, a tax of three mills for the year 1870.

The prayer is for an injunction to restrain the defendants from the collection of said eight mills county tax.

The complaint is not, that the valuation of the stock is above

its "actual" or "current" value, nor was there any appeal to the auditor general under the first section of the act of 2d April, 1868, P. L. 55.

The assessment being charged as made on or about the 5th of March, 1870, whilst the act under which plaintiff assumes it was done, having been approved on the 31st of March, 1870, it is contended that the valuation and assessment were made before the passage of the act, and were without authority of law.

The duplicate and warrant as appears by statement in writings shown, was placed in the hands of the collector in May, 1870.

But the appointment of the assessor was authorized and made under the 2d and 4th sections of the act of 12th May, 1867, P. L. 75, and in that act and in other legislation prior to 5th March, 1870, are contained authority and direction for his action. The act of 1870 although the latest effort of the Legislature to subject the large amount of capital invested in national bank stock to a share in the general burden borne by other property, is not an isolated enactment, but is part of a system.

It was held in *Mintzer v. Montgomery County*, 4 P. F. Smith, 139, that the 32d section of the act of 29th of April, 1844, P. D. 949, § 117, although passed before national banks originated, was intended to reach all kinds of money investments, and that shares of national banks are liable to assessment and taxation under this section, which makes the subjects therein enumerated taxable for "all State and county purposes whatsoever," and for a county no less than for a State tax, subject only to the restriction of the act of Congress.

The law requires the assessor within sixty days to return his assessment into the commissioners' office. This was done, the valuation and assessment remained unappealed from, and in May, 1870, after the passage of the act of 31st March, 1870, the commissioners levied this tax among others, issued the duplicate and warrant attached.

The appointment of the assessor was authorized, his valuation and the assessment of the tax in controversy were under existing and competent statutory authority, and if the taxation did not exceed the restriction imposed by Congress, which remains to be considered, was valid in law.

In *Van Allen v. Nolan*, Supt. Ct. U. S., 5th Am. Law Reg. 609, it is settled that the act of Congress of 3d June, 1864, authorizes the taxation by States of the shares in the national banks, subject to the limitation contained therein.

In *Mintzer v. Montgomery County*, already cited, and which was decided in 1867, a three mill tax for State purposes, assessed on shares of the National Bank of Pottstown was sustained, and the stock of national banks declared taxable for State purposes in the hands of stockholders.

The 41st section of the act of Congress of June 3d, 1864, under which the foregoing decision was made, expressly left open national bank shares to State taxation as part of the personal estate of the holder, but subject to the two-fold restriction, 1st, that the rate of taxation should not exceed that assessed upon other moneyed capital in the hands of individual citizens of the State, nor 2d, the rate imposed by the State upon the shares of her own State banks.

The act of Congress of 10th February, 1868, equally recognizing State authority to tax national banks, simplified the limitation of the act of 1864 by providing that "the Legislature of each State may determine and direct the manner and place of taxing all the shares of national banks located within said States, subject to the restriction, *that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State;*" the shares of non-residents to be taxed where the bank is located and not elsewhere. U. S. Stat. at Large, 1868, p. 34.

The latter clause of the restriction in the act of 1864, making the rate of State taxation of State banks one of the tests is thus omitted in the act of 1868. This modification does not affect the force of the decision cited, that shares of stock in national banks are subject to the three mill tax for State purposes, which is the present measure and limit of State taxation of mortgages, money at interest and other moneyed capital of the citizens.

Are national bank shares also subject to taxation for county purposes and at the rate of taxation levied in this case?

The plaintiff's bill discloses the fact that a State tax of three mills for the year 1870 was assessed and has been paid. This we have seen was warranted by the act of Assembly of 1844, and not forbidden by the act of Congress. But the act of 1844, which has been construed to include and prospectively authorize the taxation of national bank shares, authorizes their taxation for county as well as for State purposes.

The several items of property comprised and specified in the 32d section it is declared "shall be valued and assessed and subject to taxation for the purposes in this act mentioned and for all State and county purposes whatsoever." Prior to and irrespective of the act of 1870, these shares were taxable for all State and county purposes; as and wherever a national bank was created, its shares of stock encountered this liability. The act of Congress makes no discrimination between taxes for State and county purposes, but authorizes taxation for either and for both purposes, provided the rate does not exceed the prescribed limit.

The act of Assembly of 22d December, 1869, P. L. of 1870, p. 1573, authorized a tax by the State of one per cent., which

was declared in *Pleish v. Hartranft*, at Nisi Prius, 2 Leg. Gazette, 77, March 11th, 1870 (*ante*, p. 46—Editor), to transcend the limit fixed by Congress.

The act of 1870, on the contrary, declares them taxable for State purposes at the rate of three mills, and for county, school, municipal and local purposes at the same rate as now is or may hereafter be assessed on other moneyed capital in the hands of individuals.

So long as three mills on the dollar continue, to be the rate at which moneyed capital in the hands of individual citizens is taxed for State purposes, the act of 1870 conforms to the authority and restriction in the acts of Congress contained, and to the construction given by the courts. If other moneyed capital of the citizen is not taxable for county and local purposes, the act authorizes none for bank stock; if taxable for any or all, to that extent bank stocks are taxable. This is in literal accordance with the law of Congress.

It is not averred in the bill that the tax of eight mills upon the dollar is at a greater rate than is assessed upon other moneyed capital. The valuation by the assessor, to near three thousand dollars above the par value, we understand to be the burden of the complaint, although no appeal was taken and the tax of three mills was paid upon the valuation returned. We must therefore assume that other taxable moneyed capital of individual citizens was taxed at the same or no less a rate, and if so taxed and so taxable under State legislation, a like tax on the plaintiff's stock is permissible.

Whilst in addition to the right of appeal, relief may and should be afforded by the courts against excessive valuation of stock, yet it is the rate at which other taxable moneyed capital is assessed rather than the valuation, which Congress has adopted as the limitation and means of securing this species of property against unfriendly and excessive taxation.

The limitation to be available as a standard must be of general application; the rate is to be no greater than that assessed on other moneyed capital: not greater merely than is assessed upon some exceptional species of capital or form of investment, or upon some specific varieties of moneyed capital in the hands of citizens of some one or more counties of the State, as distinguished from the capital and the citizens of the State at large.

The general tax law subjects all the moneyed capital of the citizen to county taxation: the language is comprehensive, the leading intent, says Judge Agnew, in *Mintzer v. County of Montgomery*, 4 P. F. Smith, 140, seems to be to reach money in every form of investment. The exemption in order to promote the improvement of real estate, in certain counties, including

Luzerne, of mortgages, judgments, recognizances and moneys owing upon articles of agreement for the sale of real estate, so long as moneyed capital generally, and investments on interest whether within or without the State are taxable, cannot affect the question; certainly not in the other counties of the State, for there without exception the moneyed capital of their citizens is taxed; nor should it within the special districts where partial exemption exists, for there it is generally and in the main taxable.

The act of Congress cannot be evaded by a colorable taxing of a single or of unimportant items leaving the great mass exempt; the generality constitutes the moneyed capital named in the act.

The manifest intent was whilst protecting the stock against undue taxation, to leave it clearly subject to its fair share of the public burden, and construction should favor, not defeat such intent.

Finally, did the election to pay, and the payment to the State in January, 1871, and before the 20th, a tax of one per centum, applied by the auditor general to the year 1871, and the subsequent payment of a State tax of three mills for the year 1870, defeat the right of the defendants to levy and collect a county tax for the year 1870?

The fourth section of the act of 1870 provided that in case any bank shall elect to collect annually from the shareholders a tax of one per centum upon the par value of all the shares, and pay the same into the treasury on or before the 20th day of January in every year, the said share, capital and profits shall be exempt from all other taxation under the laws of the commonwealth.

If the views hereinbefore contained are correct, the plaintiff's shares of stocks were liable to a county tax for 1870; the tax was duly levied and has not been paid.

The bank did not, so far as the bill discloses, elect as to the taxes of 1870, nor did it direct the application of the moneys paid, to the discharge of its liability for the year 1870. The election and payment at the proper time under the act for the year 1871, were without notice to the State, that either the election or payment related to the year 1870, and after the money had been received and applied and the liability to taxation for 1871 was discharged, the bank in recognition of a liability remaining for the year 1870, paid the three mills State tax, but left the county tax unpaid.

It is urged that this does not affect the present question. That individual stockholders are not to be prejudiced by the action of the bank.

But the State treats with the bank in its corporate organiza-

tion, not with individual stockholders. The offer is "in case any bank shall elect," etc. The stockholders can only elect and pay through their corporate offices, and having done so, are affected by the liabilities incurred through, as well as the benefits resulting from such action.

The bill does not aver that the auditor general erred in his application of the election and credit, nor that the bank now wishes them or either of them referred to the year 1870.

Upon the whole case our conclusion is adverse to the plaintiff, and the questions involved having by consent been argued and submitted for the opinion of the court, upon consideration, the special injunction, heretofore awarded is dissolved and the bill dismissed at the cost of the plaintiff.

[Legal Gazette, Sept. 29, 1871, Vol. 3, p. 303.]

TWELFTH JUDICIAL DISTRICT.

Composed of the counties of Dauphin and Lebanon.

Orphans' Court.

MAIER'S ESTATE.

1. Where the widow elects to take under a will, which bequeaths the personal property equally to her and to a legatee, and the whole of which is assessed at \$207.46, she cannot claim to have three hundred dollars out of her husband's estate.
2. The notice of her claim would be too late if made after the appraisement.

In the matter of Christian Maier's estate.

Sur application of widow for an appraisement, &c.

Opinion by PEARSON, P. J.

A rule was obtained by John C. Maier, a legatee and one of the executors of Christian Maier, deceased, upon his widow, Rebecca Maier, to appear and show cause why she should not elect to take or refuse to take under the will, and also why the three hundred dollars' worth of the personal effects, claimed by her under the 5th section of the act of the 14th of April, 1851, should not be distributed to the devisees under the will of said Christian Maier. On the return of the rule, the widow came into court, by her attorney, and agreed to accept under the will, but also claimed to have three hundred dollars out of her late husband's estate under the act of Assembly. On hearing the case, the following facts were established. Christian Maier, on the 25th day of July, 1851, made his last will, which was admitted to probate on the 31st of the same month, whereby he bequeathed, *inter alia*, to his wife Catharine one-half his per-

sonal property, and to his son John C. the other half, making the latter one of his executors. On the 22d day of August, 1867, appraisers were selected, who on the same day appraised all the personal effects of the deceased at \$207.46, which was duly returned into the register's office and filed on that day. On the 14th of September, the widow had a notice served on the executors that she claimed \$300 under the exemption law, and requiring them to appraise personal property for her to that amount, and if there was not sufficient, claiming the residue out of the real estate. The first question for our consideration is, was the notice in time? By the act of the 14th April, 1851, the property about to be taken by a widow for the use of herself and family must be appraised in the manner directed by the act of the 9th of April, 1849. But by a later statute passed April 8th, 1859, Pamphlet Laws, page 425, it is provided that the appraisers of the other personal property shall appraise and set apart that intended for the use of the widow and children. The widow in the present case should, therefore, have given notice to the executors that she desired to have the \$300 worth of property appraised and set apart before the appraisement of the decedent's personal property took place and was completed.

It is well established that the debtor who claims the exemption must give notice before an inquisition is held on real estate, see 4 Harris, 300, 6 Harris, 307, or where none is required, as in sales on mechanics' liens, before advertisement, 9 Harris, 210, and this is applied to the sale of personal property in *Gilleland v. Rhoads*, 10 Casey, 187, at p. 190, Judge Woodward says: "The time for demanding the exemption is at the levy, or at latest *before the advertisement of the sale*, unless absence or other good cause be shown to excuse the delay." And in *Davis's Appeal*, same book, p. 256, it is said the right of a widow to claim the exemption is a personal privilege which she may waive, and is waived entirely by neglecting to demand an appraisement at the proper time. Now, as we conceive, the proper time for this widow to claim the exemption was when her husband's personal property was about to be appraised, as required by law, and before that appraisement was completed and returned to the proper office. If not done before, she is too late, as the same reason which applies to cases of sales by a constable or sheriff will to this—increased trouble and expense. There is no reason why the executors should be required to again convene the appraisers and incur the expense of a second appraisement of the same identical property already valued and returned. It is contended that the widow was not aware of her rights, and should not be cut out on account of the small expense of a reappraisement; that she has a strong equitable claim for relief. In our opinion the widow does not come into

court with one particle of equity, and we are strongly inclined to believe that she is precluded by another legal principle independent of her neglect to demand an appraisal at the proper time. Her husband had personal property worth but \$207.46, one-half of which he bequeathed to his wife, the other half to his only son. The widow has elected to take under that will, no doubt on account of the legacy of fifty dollars a year required to be paid her by the son during life. She now attempts to defeat the effect of the bequest of personal property by taking the whole of it as an exemption. She cannot be thus permitted to take the advantage of the other legatee. It is allowing her to enjoy the benefits of the will and get clear of any burdens imposed, at the same time defeating the just expectations of the other legatee. There is no other property for this bequest to operate upon, yet with a knowledge of that fact she accepts the benefits conferred by the will. In the argument still more is claimed for her, that she shall not be required to take the whole of the personal property towards paying her the \$300, as one-half is her own already by the will, but that she can take merely that part bequeathed to the son, and obtain the residue out of the real estate of the decedent. This we conceive would be still more inequitable. She cannot make good her own legacy under the will, and defeat the other legatee. By accepting under the will, as this estate is situated, we are of the opinion that the widow is estopped from claiming the \$300, under the exemption laws. There is another reason why she has no equity: the son was living with his father, constituting a portion of his family at the time of his death, and thus presenting an equal claim with the widow to the possession of three hundred dollars worth of property. The widow, by law, takes for the use of herself and family, yet we all know that the effect of the law has been to give her entire control over the personal effects to the value of \$300 appraised and set apart for her, and where money has been paid out of real estate she has been enabled to put it in her pocket to the entire exclusion of the heirs at law. This has often effected great injustice, and probably calls for some legislative remedy to secure the future rights of the children, especially as it often occurs, as here, that the widow is a step-mother. The law intends that each shall have an equal right in the property, and the widow is only authorized to take "*for the use of herself and her family,*" yet she too often takes for her own exclusive benefit. In the present case John C. Maier, in his petition, asks that his step-mother shall be required to hold the property, if granted to her, for their mutual benefit. This is no more than equitable, yet it is a matter that we have no power to order. When the appraisal is made and approved, the court has lost all further con-

is nothing upon which the fourth and fifth exceptions are overruled. The third exception does not show that the defendant's term is terminated," is without merit, inasmuch as it neither expressly nor impliedly, requires that or stated in any part of the proceedings. As considered that the whole proceedings and the act upon the fact that all knowledge of the closing of the term is lost, it is scarcely to be statement of the commencement, duration, term should appear. Indeed, if it did, it v whole proceedings, because it would contradict without which the jurisdiction would not attention is overruled.

The first and second exceptions are predicated upon the following affidavit, which is returned with the return.

City and County of Philadelphia, ss.:

John C. Rogers, the defendant in the above case, sworn according to law, deposes and says, that the real estate, the subject of the proceedings in this case, come in question in the trial of said case; the said real estate is claimed by deponent by purchase of the same from one Samuel Duffy, who before said property came into deponent's possession before the plaintiff ever claimed to own the same.

Wherever the title to real estate can come in question, the jurisdiction of the alderman ceases. This must be shown by the facts of the case, or in the claim of title set up by the defendant. A simple claim of title, though set up by the defendant, is not enough; it must appear that such claim is in fact a title. *Heritage v. Wilfong*, 8 P. F. S. 140. It must be shown by the facts which lead to the conclusion that the title is in question, and the facts must be such as to show that the title may be allowed to plead or prove. A tenant cannot set up a landlord's title, nor can he set up an adverse title. *Binney*, 473. He may, however, set up a title in himself, or the title of the lessor, and may show that the title has been divested. *Newell v. Gibbs*, 1 Watts & S. 400. *Heritage v. Wilfong*. It will be seen that the facts set up by the defendant's affidavit do not necessarily conflict with the title of the plaintiff, nor does it appear how they annul the relation of landlord and tenant. It does not appear from the proceedings that the title to the land can come in question; and it is evident that the relation of landlord and tenant being established they could not be a tenant.

The proceedings show that even before the

the claim of title, there was ample testimony that the relation of landlord and tenant existed. The finding of the alderman sets out that the plaintiff was the owner of the land; that the defendant was a tenant from year to year at a rent of fifty dollars per annum, and that he paid the rent of fifty dollars per annum to the plaintiff from June 29th, 1869, to January 1st, 1870. If, therefore, the facts of the defendant's affidavit would establish a title adverse to the lessor's title, he is precluded from pleading them, inasmuch as they do not bring him within any of the contingencies in which he may antagonize his landlord's title.

The exceptions are overruled and the judgment affirmed.

Court of Common Pleas, Philadelphia County.

NIPPES v. KIRK.

1. After a judgment entered by an alderman for \$14.43, and the payment to him of said amount and costs, he cannot afterwards open the judgment and rehear the cause upon the ground that there was a clerical error in entering it.
2. In proceedings for the collection of money, aldermen derive their whole authority from acts of Assembly; whatever is not therein contained for them to do, they are prohibited from doing.

Sur certiorari.

Opinion by FINLETTER, J. Delivered September 30th, 1871.

The record of the alderman recites: "And now, April 8th, at 3 P. M., plaintiff appears and claims \$14.43 * * * whereupon judgment publicly against the defendant for \$14.43. April 8th, defendant appears; same day transcript for defendant. April 27th, G. W. Wollaston paid \$14.43 and costs. May 25th, plaintiff takes a rule on defendant to show cause, if any he has, why the judgment entered in this case by mistake should not be opened and the error in the entry thereof corrected."

Against the protest of the defendant the alderman made this rule absolute; opened the judgment; heard the plaintiff anew and finally entered the judgment against the defendant for \$64.68. All this was done because the alderman alleges that the original entry of judgment for \$14.43, was a "clerical error." It is not easy to see from an inspection of the record how this entry could be a "clerical error," inasmuch as it therein appears that the plaintiff claimed only \$14.43. Again, if a clerical error, why was it not corrected, or at least noticed, when the transcript was given to the defendant, or when the defendant paid the judgment and entry thereof was made upon the record?

trol over the property, they must *scramble* for it as best they can. It is an additional reason why the widow has presented no claim for equitable relief against her own neglect in failing to make the demand for an appraisement in time. The widow's claim for an appraisement of three hundred dollars' worth of the property of the deceased under the exemption laws is refused, and it is ordered that the effects appraised be brought into the usual course of administration and distribution under the will of the decedent.

[Legal Gazette, Oct. 1, 1880, Vol. 1, p. 107.]

Orphans' Court, Dauphin County.

PARTHIMER'S ESTATE.

1. Where a decedent had promised his sons to make them a gift of certain bonds, some six or seven years before his death, but did not actually make the gift until nine days before he died, and when he was probably *in extremis*, it would seem that it was a *donatio causa mortis*, and not a gift *inter vivos*, but which ever it was, the widow is not entitled to have them brought into the administration account, and to get her third of them.
2. She is only entitled to a distributive share of the personal property belonging to her husband at the time of his death, and a *donatio causa mortis*, if valid, takes effect from the time of the donation, and not from the time of the death.

Sur exceptions to auditor's report.

In the matter of John Parthimer's estate.

Opinion by PEARSON, P. J.

The report of the auditor presents a single question—is the widow of John Parthimer, deceased, entitled to a distributive share of a bond given to him by John Kendig, for five hundred dollars, and to a like interest in four hundred dollars of government securities, under the facts disclosed? The auditor reports that Parthimer, long before his death, had an arrangement with his two sons to give them these two securities for the use of themselves and the other children; that such gift had often been promised, as much as six or seven years back, but was never carried into effect until nine days before his death, and during his last illness, when he was probably *in extremis*, though whether that was known to himself does not appear. He then by writing, under his hand and seal, endorsed on the bond, assigned it over in due form to G. W. & W. A. Parthimer, stating it to be for value received, and at the same time handed them over the ordinary bonds of the United States, amounting to \$400; both securities were delivered, and remained in possession of the sons until after the father's death. The bond of Kendig was afterwards paid to Augustus Parthi-

mer, the administrator, and the government securities are still held by them, and both are claimed as gifts from the father in his lifetime. The auditor in his report finds that the obligations were gifts as claimed, but whether *inter vivos* or *causa mortis*, he does not report. Exceptions were taken to the account by the widow, because the money was not brought into the course of administration. If the gift was valid, and passed the title, the amount was properly left out of the administration account, as it formed no part of the decedent's estate at the time of his death, but vested in the donees prior to that event.

It has every requisite to make it a good *donatio inter vivos*. The bond was formally assigned and delivered, the title to the instrument and right to receive the money passed thereby to the donee. The government securities were handed over, with proper words of gift, and the interest therein vested at once. No formal assignment of such obligations is ever made or required. They pass as money. See 2 Redfield, 309, 312; 1 Roper, p. 35. No words were used showing that the donation was conditional, or the instruments to be restored in case John Parthimer recovered. We do not know what more could be done to make the gift valid, *inter vivos*. But it is said that every donation of property must be considered as *causa mortis*, provided it is given by a person when sick, or in expectation of death from any cause, and the event proves fatal to the donor. Such gifts of chattels are said to be made by a person in his last sickness, or *in articulo mortis*, subject to the implied condition that if the donor recover, or if the donee die first, the gift shall be void. See 11 Harris, 63; 3 Binney, 370. We are inclined to think that the gift should be treated as a *donatio causa mortis*, or *inter vivos*, according to the intention of the donor as expressed at the time, or shown by all of his acts; and the fact of his not surviving should not be treated as conclusive that it was a *donatio causa mortis*; but some of the writers of undoubted authority speak of it as a legal presumption in the absence of any proof of actual intention. Some of the facts connected with this gift would indicate that it was *inter vivos*, as agreeing to make it many years before, when the donor was in good health. On the other hand the actual donation is postponed until he is *in extremis*. Yet there was no condition of revocation expressed in the gift. 2 Redfield, 299. On the whole, if obliged to decide on the evidence submitted, we should say that these obligations passed as a *donatio causa mortis*. But as we understand the law, the question is immaterial. The widow can only recover her distributive share out of the personal effects of which her husband was possessed at the time of his death, "remaining after paying his debts," and

such property as goes into a course of administration. This, if given away in his lifetime, never went into the hands of his administration, for it is clearly settled in the United States by various courts, our own among the number, that the *donatio causa mortis*, if valid, goes into effect from the time of the donation, not from the death of the donor. 1 Roper, p. 32; 2 Wh. 17.

Although a gift *causa mortis* may be revoked during the lifetime of the donor, it cannot be done by will, as that does not go into effect until after death. 2 Redfield, 820, 321; 2 Wh. R. 17; Prac. in Chancery, 309; 3 Barlow's Ch. 116; 3 Cavis, 121; 2 Gill & John. 209; 16 Ala. 225.

The position mainly relied on by the widow is, that this gift was in fraud of her marital rights, made for the avowed purpose of cutting her out of her distributive share of her husband's personal effects, and to show that such a meditated deprivation may be avoided we are referred to *Killinger v. Smith*, 6 S. & R. 581. The principles settled in that case have always been recognized as sound, but have they any application here? It must be borne in mind that the widow is entitled to dower out of any and all bonds whereof her husband was seized at any time during the coverture; of which she cannot lawfully be deprived except by her own act or the due operation of law fairly enforced, not brought about by fraud. In England, and most of the States, she could not be cut out by a judicial sale, unless she had herself executed the instrument of deprivation in the mode prescribed. In Pennsylvania, lands were very early made chattels for the payment of debts. But for more than a century, the wife was not considered as having a *vested interest* in her husband's personal property in Pennsylvania. She could be deprived of her distributive share therein by will, until the passage of the act of April 11th, 1848. Under the statute she must claim through the administrator, and can only demand distribution of what is left in the due course of administration. The donees claim by title paramount. The gift took effect before death, and the property did not pass to the administrator. In Massachusetts, where they have a similar statute, Chief Justice Shaw says, in 13 Gray, 418, "Such gifts, if confirmed and held good, do not impair the rights of the widow. Her right is to the property of which the husband died seized or possessed. These gifts have their full effect in the lifetime of the donor." To construe our statute otherwise, would be to deprive the husband of control over his personal effects during the whole of his married life, for if he could not give away a chattel on his death bed without the consent of his wife, he could not do it at any prior period. It might in all cases be construed to have been given in fraud of her marital

rights. The statute should not be considered as taking away the common law right of control beyond its letter. It is a recognized maxim, that statutes shall be construed as nearly in consonance with the common law as the words will bear.

Gifts of property in fraud of creditors may always be avoided by the persons intended to be defrauded; but the wife here must claim *through* her husband, not *paramount*, as do creditors. She can only demand the effects where the administrator could claim and demand them. Her title is through him to that, which must be brought into a course of distribution.

The auditor made a proper disposition of the question, and his report must be confirmed.

[Legal Gazette, Sept. 24, 1869, Vol. 1, p. 102.]

Orphans' Court, Dauphin County.

SNYDER'S ESTATE.

The interest of an heir in the share set apart for the widow, is the same as in the other portions of the estate, and hence, when the land of a decedent was taken by the heirs under the appraisement, and the widow's thirds charged upon the land, upon her death the estate of a deceased feme covert heir will go to her husband's assignees for the life of the husband, and after his death to her heirs at law.

In the matter of the moneys charged as widow's thirds on the real estate of Nicholas Snyder, deceased.

Nicholas Snyder died in 1835, intestate, leaving a widow and eleven children, and a large amount of real estate, on which, in 1836-7, proceedings in partition were had in the Orphans' Court of Dauphin County, and the same—except one tract which was sold—was taken by heirs at the appraisement, and the widow's thirds was charged upon the lands—according to law—prout proceedings in partition, recognizances and mortgage of record, in the Orphans' Court.

Hannah, one of the children and heirs of said Nicholas Snyder, intermarried with David F. Hoffman before her father's death, and died in 1845, leaving her husband, said David F. Hoffman, living, and issue, three children. In 1846, said David F. Hoffman, by an assignment in writing, recorded in Deed Book R., vol. 2, p. 202, conveyed, or attempted to convey, his wife's share to Thomas Harper, prout said assignment. The widow of Nicholas Snyder died in 1862. The share of Hannah has been paid into court under an order granted for that purpose, and is claimed on the one hand by Hannah's children, and on the other by David F. Hoffman's assignees.

Opinion by PEARSON, P. J.

Partition was made of the real estate of Nicholas Snyder

among his widow and children during the years 1836 and 7, and a certain portion was charged thereon for the widow during life. She died in the year 1862, and the money is now in court for distribution.

That part thereof allotted to Hannah, wife of David F. Hoffman, is claimed by her children, and by Thomas Harper, to whom it was assigned by her husband in the year 1846. Mrs. Hoffman died in the year 1845, leaving issue, and her husband surviving, all of whom are still living.

It is not pretended that Mrs. Hoffman ever signed a writing under the 48th section of the act of 1832, agreeing that her husband might receive her distributive portion of her father's estate, and the one open question under the decisions is, has the heir the same interest in the share set apart for the widow of a decedent, that she has in the other portions of her father's estate, arising from the proceeding in partition? Every other question is settled by the plain words of the act of 1832, and the judicial decisions thereon.

Under our former statutes it was much lamented by the judges that they had not the power to secure a feme covert heir her interest in her ancestor's estate, in cases where it was turned into money in making partition. See *Yohe v. Barnet*, 1 Binn. 365; *Ferru v. Elliott*, 8 S. & R. 315; same book, 172, and other cases. To remedy which the framers of the code made provision in the 48th section of the act of 1832, that the husband should not receive his wife's portion paid in money for owelty, or allotted in any other manner in lieu of her real estate, without the separate declaration of the wife in the method therein prescribed, that she desired the same to be paid over to him. In the absence of such declaration, the Orphans' Court would require him to give security that such portion as it should deem proper must be paid to her heirs after her death, the same as if it had remained real estate, and on his failure so to do the court was authorized to place the money in the hands of trustees, to be held for the use of the husband during life, and for the wife's heirs after his death. So strict has been the construction of this act, and of the doings of the parties under it, that we find soon after its passage the Supreme Court decided in *Walter's Estate*, 2 Wharton, 246, where a *feme covert* declared her willingness for her husband to receive her distributive share before she knew the exact amount thereof, such declaration was not valid or binding, but might be revoked. And again, in *Boyer v. Reesor*, 5 W. & S. 501, where the declaration was made and duly acknowledged in the lifetime of the wife, but was not filed as required by the statute, the writing was void, and the husband could not receive the money. Taking it as settled law that the husband cannot obtain the money allotted to the wife

for her distributive share in making partition of her father's estate, in what particular does the portion set apart for the widow during her life, differ from the fund distributed? We are unable to perceive that it stands in any different situation. If the land itself is parted and divided into as many portions as there are heirs, each must pay the widow the sum charged on it respectively. If one heir takes the whole at a valuation, the amount to be paid to each heir, and the widow, is designated; but that to be received by the widow is for life only, after which it goes to the heirs precisely as it would have gone had it been distributed at the time of partition—it must be divided as the land itself would have been, and partition of the fund is only suspended during the widow's lifetime. Whilst this fund is in the hands of the widow, it is not treated as money but as land, of which she is tenant in dower—is in the nature of a rent charge, with like remedy by distress to enforce payment. 4 Wright, 176-7. It is real, not personal property, 11 Casey, 189, 190; and must be conveyed as other real estate, 3 W. & S. 456; can be sold by the sheriff as the widow's estate, 3 Barr, 69, and if so sold as the property of the heir, she is entitled to claim rent as other landlords out of the purchase-money.

The distinctive character of the original estate as dower is kept up, although it is land converted into money for a special purpose. The interest of Mrs. Hoffman, her husband and children, in the fund allotted to the widow of Nicholas Snyder, stands precisely as it did at the time of partition, and must be disposed of on her death, just as it would have been at that time.

David F. Hoffman was, before partition, tenant by curtesy in the real estate belonging to his wife; and under the act of Assembly referred to, was entitled to the money awarded to her in lieu of her share in the land, on giving security to the satisfaction of the Orphans' Court, that the amount thereof should be paid to the wife, if she survived him, or to her heirs if he survived her, the same as if it had been land; or in case of his inability or refusal to give the security, the money must be invested in the hands of a trustee for the use of the husband during life, and for the wife's heirs after his death; thus keeping up the curtesy estate. No security was ever given by the husband, consequently neither he nor his assignee is entitled to the money in court, but it must be given over to some trustee, to be appointed by the Orphans' Court, and placed at interest, which must be paid to Harper as assignee of Hoffman during the lifetime of the latter, and on his death the principal must be distributed among the heirs at law of his deceased wife Hannah, precisely as the land would have gone had it never been converted into money.

We have been referred to a number of authorities by the counsel of Mr. Harper, to prove that when land is converted into money under a judicial proceeding it must be distributed ever afterwards as money, and no longer retains its original characteristic. Such is the case of *Grider v. Grider's Admin'r*, 11 S. & R. 224; *Dyer v. Cornall*, 4 Barr, 359; *Evans v. The Commonwealth*, 1 Jones, 374; and *Pennel's Appeal*, 8 Harris, 515; and many others might have been cited to the same effect. But upon examination it will be found that none of them have any application to the present case; are precisely what this would have been independent of the act of 1832. They are sales made by executors, administrators, guardians, or trustees for the payment of debts, or maintenance of minor children, and none of them are conversions of land into money by proceedings in partition, which is regulated by a different statute; and such was the law of this case when *Yohe v. Barnett*, and *Grider v. Grider's Admin'r* was decided.

On the facts stated, the Orphans' Court must order the money to be invested in the hands of a trustee, for the use of Harper during the life of Hoffman, and for the heirs of Hannah Hoffman after his death.

[Legal Gazette, Sept. 3, 1860, Vol. 1, p. 76.]

FIFTEENTH JUDICIAL DISTRICT.

Composed of the Counties of Delaware and Chester.

Orphans' Court.

CURRY'S ESTATE.

1. The power of the Orphans' Court to review its decrees does not depend upon the act of October 13th, 1840, but rests upon the power inherent in it as a court of chancery.
2. Its jurisdiction to review its record will only be exercised on those grounds on which a court of chancery will support a bill of review, to wit, on the ground of "error apparent" in law on the face of the record, after discovered evidence, or new matter.
3. When a guardian is shown to have received the money of his ward, interest is chargeable as of course against him after a proper time for investment, and hence where it appeared that interest had not been so charged, the review will be granted.

Sur petition for review of decree of Orphans' Court.

Opinion by BUTLER, P. J.

This is an application for review of the decree of the Orphans' Court, confirming the administrators' account.

Under what circumstances may such an application be granted? On this question the decisions of the Supreme Court

are in direct conflict. In *Emery's Estate* we held that the circumstances must be such as would justify a review in a court of equity. That is to say, it must appear that new matter has arisen; or new proof been discovered, since the decree; or that "error in law" has been committed, and this be shown by the record. That case was carried up, and was affirmed by the Supreme Court, in 1866, but singularly was never reported. (It is known as *Pennypacker's Appeal*, and is inserted after this opinion.)

In the case before us the petition sets out that a large sum of money is credited to Ellis P. Curry, for money loaned and wages; and that the accountants have charged fifty-two dollars and fifty cents, compensation for their services, while it is believed the money so credited to Ellis was not due; and that the administrators should not be allowed anything because of their unfaithfulness in performing their duties. Here is no suggestion of new matter arisen or new proof discovered, since the decree. Nor does the record show any error, either in crediting Ellis P. Curry with the amount allowed him, or in discrediting the administrators with the sum retained for compensation.

The statement that the petitioners had no knowledge of the account being filed is unimportant. Notice having been given as required by law, all persons are precluded from alleging ignorance of the fact. If it were otherwise, the confirmation of an account would be little more than an idle ceremony, very few cases would be found in which a review might not be had.

The petition is for these reasons dismissed.

The following is the case referred to in the foregoing opinion:

EMERY'S ESTATE—PENNYPACKER'S APPEAL.

Opinion by BUTLER, P. J.

The complainant has presented a bill or petition, for review of the decree confirming the auditor's report, on the account of her guardian. Her application is resisted on the ground that she has not shown a case calling for the action of the court.

What is a proper case for review in the Orphans' Court? The act of October 13th, 1840, is, in terms, confined to accounts of executors, administrators and guardians. And it might be doubted whether it was intended to apply to a case like the one before us, where litigation has taken place, and the decree is, therefore, not a simple confirmation of the account. This, however, is unimportant. The power of the Orphans' Court to review its decrees, does not depend on the act referred to. Long

prior to its passage such a jurisdiction existed, and this act does not take it away. *Brigg's Appeal*, 5 Watts, 91; *George's Estate*, 2 Jones, 260. But what circumstances are necessary to call for its exercise?

The rule in *chancery* governing an application for review, is well understood. It must appear either that a plain error in law has been committed (and this be shown by the record), or that new proof has been discovered; or that new matter has since arisen. Does the same rule prevail in the Orphans' Court? If it does, no lawyer of experience can doubt that it has been greatly disregarded in practice. Nor can it be doubted that the Supreme Court, in time not very long passed, has most emphatically denied that it does. In *George's Estate*, 2 Jones, 260, a bill was presented for review of a decree in partition. One of the heirs had sold his interest in a *part* of the land; and the original petition, through inadvertence, recited that he had sold his *entire interest* in the premises. The decree accordingly awarded the appraised value of this interest to the vendee. The heir had died after making the sale, and his share, so far as not disposed of, descended to his brothers and sisters; and these brothers and sisters were the original petitioners who committed the error alluded to. Some time after the decree had been entered and the proceeding terminated, they applied for review. Now here was no "after discovered proof;" nor "new matter arisen since the decree;" nor any pretence of "error in law apparent on the record." The error arose from carelessness of the parties asking relief against it.

It was clearly a case in which *chancery* would *not* have entertained the bill. And yet the Supreme Court, while acknowledging this, granted the relief. The judge delivering the opinion said: "It must be admitted that a court of chancery would not, in a case like this, entertain a bill of review; for here is neither suggestion of new matter discovered since the decree, nor the averment of error apparent on its face, one of which is necessary in chancery to found such a prayer. But where it is shown that an injurious mistake exists, though in part ascribable to the party averring it, we do not think the Orphans' Court ought to be deterred from correcting it by the sole fact that it is not apparent on the record. Though it has been observed of these courts, that in respect to the limited objects of their jurisdiction and their modes of proceeding, they are to some extent to be regarded as courts of equity, and a disposition has been manifested to mould their proceedings upon the forms that pertain in chancery, we have never held that they are bound by the same rigid rules of practice, or subject to the nice distinctions in the administration of their jurisdiction which time, and a somewhat subtle temper of a bygone age,

contributed to impress on the older tribunal." And a number of cases are referred to in support of the position. Now this is not *obiter dicta*. It is a decision of the point—a solemn adjudication of the question we are considering. I am aware that in *Hartman's Appeal*, 12 Casey, Judge Maynard (whose views seem to have been adopted by the court above), in a very able opinion, makes an attempt to show that *chancery* would have entertained the bill in *George's Estate*. He says if the error complained of did not appear on the record, it was the fault of the *pleadings*, and in effect, asserts that what is said in the opinion in that case was, therefore, unnecessary to its decision, and is not to be regarded as authoritative. I cannot so understand the case. No pleadings in the application for review could introduce into the record of the original case a fact not already there. But, says the learned judge, "the deed from the heir was doubtless recorded." What would this have to do with the record in *partition* in the Orphans' Court. A proper reference to it in the original petition might possibly have been important in this respect. But it was not so referred to, nor does it anywhere appear even that the deed was recorded. The Supreme Court in deciding the case, with the record before it, declares that the error *does not there appear*, and that "*chancery would not therefore grant the relief*." This certainly should be regarded as conclusive. I submit with deference, that it is impossible to *explain this case away*. It settles the question discussed by the learned judge, and now under consideration; unless it has been resolved to overrule and disregard it.

Has it been so resolved? It looks much like it.

In *Riddle's Estate*, 7 Harris, 431, the court refers to the rule in *chancery* and treats it as applicable to a bill for review in the *Orphans' Court*. The judge says there must be error in law apparent on the face of the record, without further examination of matters of fact; or new matter must have arisen, or new proof been discovered since the decree.

In *Bishop's Appeal*, 2 Casey, 470, the same view is stated and the same doctrine announced.

In *Russell's Estate*, 10 Casey, 258, this is repeated, and the two preceding cases, *Riddle's Estate* and *Bishop's Appeal*, are referred to as "*establishing the doctrine*."

Following this comes *Hartman's Appeal*, 12 Casey, 74, in which the court reiterates what was said in *Riddle's Estate*, and the cases following it, to which I have adverted.

It may be urged in answer that these cases, strictly considered, did not involve this question, and that its discussion and decision was therefore unnecessary; that in each of them the most liberal rule ever applied by the Orphans' Court, or sup-

posed to prevail in that tribunal, must have produced the same result. And this would seem to be true. Yet an examination of the opinions delivered in these cases will not leave the mind in doubt, in respect to the conclusion to which the Supreme Court has come. *George's Appeal*, though not adverted to by that tribunal in either of the cases just cited, is *virtually overruled*.

How, then, does the matter before us stand? Has the complainant shown a case which would induce *chancery* to grant a review? It is not alleged that any new matter has arisen since the decree, nor that new proof has been discovered. Does it appear by the record that an *error in law* has been committed? In ascertaining this we must look at the whole record, including the auditor's report, and not simply at the decree, as in England, where all the facts on which it is founded are required to be stated on its face. In examining the record we find that in April, 1856, the complainant arrived at age, and that the respondent had in his hands, as her guardian at that time, the sum of thirty-seven hundred and forty-three dollars and seventy-eight cents; that in June following he paid to her thirty-one hundred and ninety-four dollars, retaining five hundred and forty-nine dollars and seventy-eight cents; that the ward being then of age the balance was fully due her, and should have been paid; that up to the time of the decree he continued to retain it, claiming that it belonged to himself, and appropriating it to his own use. We further find that the respondent is treated by the decree as if this balance had become due at the time of its date—that the complainant is awarded the amount which she should have received in 1856, *without interest*, or any compensation for its detention during the many years which elapsed between that time and the decree.

Now, is this "error in law?" What is the meaning of this term? I think an examination of the authorities will show that it signifies an error which deprives a suitor of his rights. Wherever it appears by the record that a party is entitled to a decree or judgment for a particular thing, and it is not awarded him, there is "error in law." As before stated it must be a *plain* mistake, not a matter depending on the exercise of judgment, about which different opinions might be entertained, but what Lord Eldon, in *Perry v. Phelps*, 17 Ves., terms "error apparent," such as results from oversight or inadvertence.

Then does the record in the case before us show that the complainant was entitled to have interest from 1856, when the money should have been paid, to the date of the decree? Was it her *right, upon the facts thus exhibited*? If not, she has shown no cause for review. If it was, she has.

It is argued for the respondent, that interest from a guardian is not of course, and that, therefore, without more appearing, it

was not the right of the complainant to have it; and *Winter's Appeal*, 4 Harris, is cited as authority for this proposition. That was an attempt to charge an *administrator* with interest on money from the time of receiving it, without evidence that he had used it for his own profit, or had not applied it to the payment of debts; and the court in disallowing it, said his liability did not follow from the mere receipt of the money; that he might have paid it out in discharge of debts, etc. I do not consider what was there said as applicable here. Where a guardian is shown to have received money of his ward, interest is of course, after a proper time for investment, and without more appearing, always charged. But especially it is, of course, if it appear that the guardian has applied the money to his own use. Here we have a case in which the guardian, when his ward arrived at age, paid her a part of what was due, and retained the balance, claiming it to be, and treating it as his own. The conclusion that he used it as such necessarily follows. If, therefore, we treat him as a guardian since the ward attained her majority (and he must be so treated until he settles with her in a manner satisfactory to the Orphans' Court), he is clearly responsible for interest. If he was treated as a *common debtor* after making the partial payment and obtaining the ward's release, he could not escape liability for interest. Between debtor and creditor interest is allowed by law, as a compensation for detaining the debt after it matures.

It cannot be doubted, that the complainant would have been allowed the interest which she now claims, if counsel had not inadvertently overlooked the fact that the auditor had not added it. Nor do we see how any possible injustice can result to the respondent from allowing it now.

Of the other matters complained of in the petition, we need say no more than that they clearly do not come within the rules above stated, governing applications for review.

[Legal Gazette, Nov. 19, 1909, Vol. I, p. 166.]

Court of Common Pleas.

SERRILL v. BURK.

1. Where a contract for sale provides that its terms must be accepted within a certain time, *e. g.*, sixty days, the time is computed from the day of its date and exclusive of it.
2. There is no want of mutuality in such a contract, when it is accepted both parties' rights are vested, and either may sue.

Opinion by BUTLER, P. J.

1. Was the plaintiff's election made in time? The offer of sale bears date September 14th, and was to be accepted (if at all) "within sixty days from the date." If the 14th is included

in the count, the election came too late, otherwise it was in time.

For the defendant it is urged that this day is to be included; and *Pugh v. The Duke of Leeds*, Cowper, 725; *Thomas v. Afflic*, 4 Har. 14; *Barber v. Chandler*, 5 Har. 48; Price on Limitations, 361; and *Marys v. Anderson*, 12 Har. 272, are relied upon. But *Pugh v. The Duke of Leeds*, was upset, virtually, by *Lister v. Garland*, 15 Ves. 248, decided soon after, and since followed by *Webb v. Fairman*, 3 M. & W. 473; *Young v. Higgon*, 6 M. & W., and *Robinson v. Waddington*, 13 A. & E. (N.S.) 753; and *Thomas v. Afflic*, and *Barber v. Chandler*, are overruled by *Cromelien v. Brink*, 5 Casey, 522, which is followed by *Marks v. Russel*, 4 Wright, 372; while the statement of Mr. Price (Lim. & Liens, 361) is unfortunately based on *Thomas v. Afflic*, and *Barber v. Chandler*, which he says he thinks conform to the English rule; but he means the rule of *Pugh v. The Duke of Leeds*, since abandoned. *Marys v. Anderson* is inapplicable, having been expressly put (as is remarked in *Cromelien v. Brink*) "on the understanding of the country respecting the end of a tenant's term."

Cromelien v. Brink, and *Mark v. Russel* (which seem to have been overlooked by the counsel on both sides, for they are not referred to in the arguments submitted), seem to us to remove all difficulties in respect to the point under consideration. In the first the opinion of Judge Porter is so lucid and so thorough, as to afford a reasonable hope that we may not again get astray on this most important subject.

In *Lysle v. Williams*, 15 S. & R. 135, Judge Rodgers says that "when the words from the date are made use to denote a *terminus in quo* an immediate interest to pass the date of the instrument is *inclusive*; that a distinction is to be taken between a case in which these words are used by way of computation of time, and when used by way of passing an interest." For this he cites no authority; and we have not been able to find any that is very satisfactory. He further says that "the reason of the rule is, that when words of an equivocal meaning are made use of, the construction shall be most advantageous for him in whose favor the instrument is made." We need not therefore inquire into the soundness of the rule; for in the case before us the construction most advantageous to the plaintiff, for whose benefit alone the condition was inserted, would extend the time for acceptance as far as possible. And no interest vested until the acceptance came. It is true, as the defendant says, that the plaintiff might have accepted on the day the paper was signed; but this is because the time granted was exclusively for his benefit, and he might therefore waive it. The same thing could not as well have been said in *Cromelien v. Brink*; there the party might have waived the time allowed

him to redeem, and taken his land back the day it was sold; but still, as we have seen, this day could not be counted against him when he did not. The election came in time; but the defendant raises another question.

Will equity enforce the contract? Certainly not, if the rights of the parties are wanting in mutuality, as the defendant asserts. But after the plaintiff elected to accept, we see no want of mutuality. The paper of July 14th, signed by the defendant, and that of September 12th, signed by the plaintiff, constitute the contract; and upon it either may sue at law or in equity. All contracts are reached as this was—by an offer on one side and an acceptance on the other. Sometimes the acceptance follows immediately on the offer; frequently it does not, as where the treaty is by correspondence. Sometimes a period is named during which the offer will continue; but whether the acceptance follow immediately, or come within a period granted for consideration, the result is the same. In the case before us, time was granted to consider the offer; until it was accepted there was no contract of sale; but after that event there was, and the rights and remedies of the parties were mutual. 1 Parsons on Contracts (3d edition), 403-4-5-6, and Fry on Specific Performance (100 Law Lib.), sects. 166, 168, 173, 181, 183.

The counsel for the plaintiff will prepare a decree and submit it to the counsel for the defendant, overruling the demurrer.

[Legal Gazette, June 23, 1871, Vol. 3, p. 195.]

TWENTY-SIXTH JUDICIAL DISTRICT,
Composed of the Counties of Columbia, Wyoming, and
Sullivan.
Court of Common Pleas.

COMMONWEALTH V. JACOBUS.

1. The business of a barber in shaving his customers on Sunday morning is "worldly employment," not excepted from the prohibition of the act of 23d April, 1794, as "a work of necessity or charity."
2. In convictions under that statute technical niceties are not required. An adjudication that the defendant has *forfeited* the amount of the penalty imposed by the statute, is sufficient without an order or judgment that he *pay* that sum.

Certiorari to a justice of the peace.

Opinion by ELWELL, P. J. Delivered February 8th, 1870.

The information charged the defendant, a barber by occupation, with performing worldly employment or business, not

being a work of necessity or charity, on Sunday, in shaving and dressing the hair of divers persons for hire. When the defendant appeared he admitted the facts as charged but denied that they constituted a violation of the act of Assembly. He alleged there, as he does now in his exceptions, that the business of shaving and dressing hair on Sunday is a work of necessity and not prohibited or punishable under the act of 22d April, 1794.

The answer or plea of the defendant was in effect a demurrer to the complaint on behalf of the Commonwealth, and as the justice rendered judgment against the defendant, the question is distinctly raised whether, as a matter of law, the business of a barber, without regard to any particular or special circumstances, is excepted out of the operation of the statute.

By the first section of the act of Assembly before cited, *Purd. Dig.* 924, it is enacted that "if any person shall do or perform any worldly employment or business whatsoever, on the Lord's Day, commonly called Sunday, works of necessity and charity only excepted, every such person so offending, shall for every such offence forfeit and pay four dollars, to be levied by distress," &c. From the operation of this section, the Legislature, in a proviso exempted the dressing of victuals, the landing of passengers, the ferrying over the water travellers with their families, and the delivery of milk or other necessaries of life before nine o'clock in the forenoon, and after five o'clock in the afternoon.

The work of the defendant is a "worldly employment" as much as that of any tradesman, artisan or mechanic. It is not embraced within any of the works enumerated in the proviso, and if saved from the ban of the statute it must be because within the protection afforded in the body of the act to works of necessity and charity.

It is argued that as the law does not forbid a person to wash and shave himself on Sunday, and thus to prepare himself to attend public worship, or otherwise properly to enjoy the rest and recuperation which it was the purpose of the day to give, therefore, another may do it for him without incurring the condemnation of the law. This view of the law is not sustained by the authorities. In *Johnston v. The Commonwealth*, 10 Harris, 108, it was held, that although a line of public conveyances running from one point to another would be a great public convenience, enabling persons to attend church, to visit friends, and ride for health, yet as the business of conducting the line was a mere secular employment, established and maintained for private gain, ministering and intended to minister merely to the convenience of the public for a price, the driver of any such conveyance incurred the penalty imposed by the statute.

On page 112 it is said per Woodward, J., "the motives of an occasional customer do not determine the character of a man's business. Its character is acquired from its general aspects and from the intention of the person *prosecuting* it, rather than from those of the person *patronizing* it."

In *Sparhawk v. Union Passenger Railway*, 4 P. F. Smith, 401, Mr. Justice Strong, at Nisi Prius held, "that the necessity to excuse, must be a necessity to him who does the act. It will not avail to assert that the act done is a convenience or necessity to others."

It is further contended by the counsel for the defendant, that long continued usage and customs of society prove that the business of a barber is by common consent considered a necessity within the meaning of the law. And the forcible and exhaustive arguments of Lowrie, C. J., *Commonwealth v. Nesbit*, 10 Casey, 398, are urged upon our consideration as decisive of this case. In my judgment the points ruled in that case and those to be decided here are in no way alike. *There* it was held that a hired servant without violation of the act of 1794, might drive his employer's family to church on Sunday in the employer's private carriage—while *here* the defendant claims that he may lawfully keep an open public shop on Sunday, shaving and dressing the hair of whoever may come, whether his customers intend to go to church or not, and whether he is entirely able to shave himself or not. In short without regard to the necessity of the particular acts done he claims the right to exercise his "ordinary calling" on Sunday as on other days. This has been forbidden from the earliest settlement of this State, as will be seen by reference to the statutes cited by Woodward, J., in *Omit v. Commonwealth*, 9 Harris, 426.

But we may inquire has there been such general and uniform usage in regard to the employment under consideration as gives interpretation to the law? If so, where shall we look for the evidence of it?

In the third exception to the conviction in this case it is averred that the justice erred, because the defendant closed his shop at ten o'clock on Sunday morning and shaved no more after that hour. This is *his* rule. But there are other barbers who continue their labors until a later hour, and some who refuse to open their shops on Sunday. There is not to our knowledge any uniform rule or usage upon the subject. If it is a lawful, because a necessary work, there is no reason why it may not be continued until all customers are served.

But is it a work of necessity? Many persons shave themselves on that day, who are shaved by a barber on other days of the week. And not one in ten of those who shave on that day employ the services of a barber.

This question does not appear to have been decided by any of the Superior Courts of this State, but in my judgment the doctrine of the cases above cited goes far towards answering it in the negative.

In England the question was directly decided in 1837 by the House of Lords. *Phillips v. Innes*, Clark & Finnelley Rep. 234. The Lord Chancellor in delivering the opinion of the court said "the work of shaving customers by a barber on Sunday morning is not a work of necessity nor is it a work of mercy, it is one of mere convenience." Lords Wynford and Brougham concurred, the latter saying that "this is not a work of necessity, or mercy, or charity."

In the progress of that case to the highest judicial tribunal, the usages upon the subject, which were much the same in that country as here, were invoked in vain against this construction of the statute.

Although not bound by it as authority, yet as this decision is the only one to be found upon the point in question, and emanates from judges of great learning and ability, and as its conclusions are, as I believe, in accordance with the purposes for which laws for securing the observance of the Sabbath were passed, I adopt them as applicable to the act under which the defendant was convicted.

If the closing of these shops on Sunday is an inconvenience to the public, the remedy rests with the Legislature and not with the court.

In regard to the objections to the form of the conviction, it is enough to say that in that part particularly specified in the assignment of errors, the justice has minutely pursued the precedent prescribed by the act. *Purd. Dig.* 810. It was unnecessary for him to incorporate in his adjudication that the defendant should *pay* the sum forfeited. When properly convicted of the offence *the law* required payment.

When the Legislature introduced into the 4th section a *form* of conviction, they intended to guard against reversals for want of technical niceties. *Commonwealth v. Wolf*, 3 S. & R. 48.

This record contains all the essentials of a valid conviction under the act for the prevention of vice and immorality, and the proceedings must therefore be sustained.

Conviction affirmed.

Court of Common Pleas, Columbia County.

IN EQUITY.

GORRELL et al. v. MURPHY et al.

1. In estimating the value of real estate, it is the duty of an assessor, under the act of 1844, to value coal breakers, houses, and other improvements, erected by tenants under a mining lease, without regard to whether they are owned by the landlord or the tenant, or whether as between the landlord and the tenant they are real or personal estate.
2. It is the more regular mode to value the whole together as *land*; but if the improvements only are valued and assessed to the tenant, he, being liable by statute to pay all taxes assessed during his possession or occupancy, has no grounds for complaint.
3. When the general power to assess exists, the proper remedy for illegal taxation is by appeal to whom appeal is required to be taken. If no appeal be given, the court cannot review the judgment of the taxing officers.
4. If power to make the assessments does not exist, the person aggrieved by making payment of the tax under protest, has an adequate and complete remedy by action at law against the taxing officer for the recovery back of the money paid.
5. As a general rule, mischief or damage is not *irreparable* which admits of compensation in a single action.
6. Except in a case clear of all doubt, a preliminary injunction ought not to be issued to prevent a collector of taxes from obeying the mandate of his warrant.

Motion for special injunction.

Opinion by ELWELL, P. J. Delivered September 11th, 1871.

The bill of the complainants, in substance charges, that they, as lessees of the Locust Mountain Coal and Iron Company, have erected upon the land leased, a coal breaker, dwelling houses, machinery and other improvements for the purpose of carrying on the business of mining and preparing coal as they have a right to do under their lease, and that these improvements are held and owned by them distinct from the freehold, and are personal property—that the commissioners of Columbia county have illegally and improperly assessed and valued said improvements, and the supervisors of Conyngham township, and school directors of the school district of said township, and the said commissioners, have illegally assessed taxes thereon, and severally issued warrants to the defendants as collectors of such taxes, and praying that said collectors may be restrained from further collection of said taxes.

By the act of 29th of April, 1844, *Purd.* 949, *houses*, land, and all other real estate not exempt by law from taxation, are made subject to taxation for State and county purposes. By the act of 15th May, 1841, *Purd.* Dig. 925, all objects of taxation are required to be assessed according to the actual value.

The act of 1844 is comprehensive in its terms. Under it, although not named in the act, warehouses, coal lots, coal shutes, machine shops, wood yards and the like are taxable and may be valued as such. *Railroad v. Berks County*, 6 Barr, 70.

It would seem, however, from the allegation in the complainants' bill that because the houses, breaker and other improvements were put upon the leased land for the purpose of carrying on the business of mining and preparing coal advantageously, they are claimed to be *personal* property, not liable to be taxed *as such*, because not named in the statute, and are not to be taken into consideration in valuing the land, because, as between the landlord and tenant, the buildings may be removed during the term.

These buildings are *fixtures* for the time being—they are *annexed to the freehold*, and form part and parcel of it. When an assessor finds land with a house upon it, he may assess both the house and the land together, or he may assess the land and house separately. But if he finds that the house has been erected by the tenants of the land, he would not be justified in refusing to assess it at all.

By the act of Assembly, tenants are required to pay all taxes assessed during their occupancy. If, therefore, the land at its full value, including all the improvements upon it were assessed (as perhaps it should be) to the landlord or owner, the tenants could not be heard to complain that the land was valued too high, on the ground that the improvements were *his* and not the landlord's. The landlord could not complain because his land would not *in fact* be valued beyond its market value. And if the interest of the landlord and tenant were separately valued, as was done by the taxing officers and approved by the Supreme Court, in *Logan v. Washington County*, 5 Casey, 373, neither party, nor the public would have just cause of complaint.

It is worthy of remark that it does not appear that the *land* leased to the complainants is assessed at all otherwise than by the assessment of the buildings, breaker and improvements, of which the bill makes complaint.

In England this question has been settled by a direct adjudication. *Reg. v. Guest*, 7 Adolph. & Ellis, 951, in which it was held, that in estimating the *ratable* value of property, machinery attached to it ought to be taken into the account, without considering whether it was *real or personal estate*, or *whether it belonged to the landlord or the tenant*.

I hold, therefore, that the assessing officers had the right to assess this property. If the valuation was erroneous, the remedy in regard to the tax assessed by the county commissioners

was by appeal to them. *Kimber v. Schuylkill County*, 8 Harris, 368; *Hughes v. Kline et al.*, 6 Casey, 230.

If, however, this conclusion is incorrect, and the property is not liable to assessment, the complainants have a full and complete remedy at law. If compelled to pay against their protest, they may by action recover back the taxes collected. *Hospital v. Philadelphia County*, 12 Harris, 230, and cases there cited; and *Commonwealth v. Stinger*, 2 Casey, 426.

The distinction recognized in these cases between erroneous and illegal assessments is denied in the recent cases of *Wharton v. Borough of Birmingham*, 1 Wright, 371; and *Clinton School-Director's Appeal*, 6 P. F. Smith, 315. In the latter case it is said, per Agnew, J., that "all of the cases assert the doctrine that when the general power to assess exists, the proper remedy for illegal taxation is by appeal to those to whom the appeal is required to be taken; and if none be given, neither the Common Pleas nor this court can review the judgment of the taxing officers." If in the exercise of an honest judgment upon the claim, the exemption was refused, a court of equity could not revise the judgment of the board by injunction. If on the other hand exemption was wantonly and maliciously refused, the remedy is against the directors personally.

If this view of the law be correct, it is decisive against the claim of complainants to equitable relief. They have failed to seek the remedy given by statute.

If the views of the court as expressed by Lewis, J., in *Hospital v. Philadelphia County*, are a correct disposition of the law, they are equally fatal to complainants' motion.

No court of equity, says Mr. Justice Field, in delivering the opinion of the Supreme Court of the United States in the case of *Dow v. City of Chicago*, 3 Legal Gazette, 258, "will allow its injunction to issue, to restrain their (the taxing officers) action, except where it may be necessary to protect the rights of the citizens whose property is taxed, and he has no remedy by the ordinary process of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a court of equity can be invoked." Again he adds, "And except where the special circumstances which we have mentioned exist, the party of whom an illegal tax is collected, has ordinarily ample remedy against the officer making the collection or the body to whom the tax is paid."

"Here such remedy existed. If the tax was illegal the plaintiff protesting against its enforcement might have had his action, after it was paid, against the officer or the city to recover back

the money. No irreparable injury would have followed to him from its collection. Nor would he have been compelled to resort to a multiplicity of suits to determine his rights. His entire claim might have been embraced in a single action." This opinion of the learned judge fully refutes the claim of complainants to equitable relief. It is in full accord with the doctrines and practice of the courts in this State, which have often held, that a bill in equity will not lie for a mere trespass. *Mulvaney v. Kennedy*, 2 Casey, 44—certainly not, if the trespass be of a fugitive and temporary character, and adequate compensation can be obtained in an action at law. Brightley's Eq. Jur. 251. As a general rule, mischief or damage which is susceptible of compensation in damages, is not irreparable. *Richard's Appeal*, 7 P. F. Smith, 105; *Brown's Appeal*, 11 P. F. Smith, 17.

Upon a careful consideration of the facts alleged in the plaintiffs' bill, I am unable to discover that any irreparable injury is about to be inflicted upon the complainants—on the contrary, if they are compelled to pay this tax, they only bear their share of the public burdens, proportioned according to their interest in real estate not exempt by law from taxation. It would be contrary to the whole spirit and intent of the tax laws, to allow coal breakers, houses, barns, shops, factories, stores and other improvements to be rejected in estimating the value of lands, on the ground that they had been erected or made by a tenant and not by the owner of the soil. As between the tenant and the landlord their rights may be several, but as between either and the public, it is not in the power of the parties by a lease for ten, or ten hundred years, to defeat the right to impose upon that which they have given the impress of real estate by affixing it to the soil, a fair share of the public taxes.

It is upon taxation that counties, townships and school districts rely to carry on their respective municipal governments; any delay in the proceedings for collecting the taxes imposed, might materially derange the operations of county commissioners, supervisors and school directors, and thereby cause serious detriment to the public. Except, therefore, in a case clear from all doubt, the strong arm of the court, in the shape of a preliminary injunction, ought not to be put forth to prevent a collector of taxes from obeying the mandate of his warrant.

It would have been more regular to have valued the whole of this property together as land, assessing it to the landlord or to the tenant; but as it has not been *excessively* valued in the present mode, I am unable to discover any injury to the complainants. But even if the tax were *illegal*, I see no grounds for the granting of a special injunction which would not equally

justify such interference in any case of threatened invasion of real or personal property.

And now, September 11th, 1871, motion overruled and special injunction refused.

Spinney & Bryson and R. F. Clark, Esqs., for plaintiffs.

C. R. Buckalew and J. G. Freeze, Esqs., for defendants.

[Legal Gazette, Sept. 23, 1871, Vol. 3, p. 306.]

Orphans' Court.

Estate of HENRY DEIGHMILLER, deceased.

1. A bequest for life, with remainder over, of personal property, gives to the first taker a right to consume such of it as cannot be used without being consumed: as to this the law of Pennsylvania is the same as the civil law.
2. Where a widow allows her minor son to take out letters of administration on the estate of her deceased husband, she will not be allowed to hold him responsible for losses happening by reason of his lack of judgment and discretion.

Sur exceptions to Auditor's report.

Opinion by ELWELL, P. J.

The exceptants (the widow and daughters of the testator), insist that the late administrator with the will annexed should be charged with the value of all the personal estate; that it was his duty to have had it appraised and sold, instead of allowing it to remain upon the farm where he and his mother resided. By his will the testator gave his farm to his widow Barbara Deighmiller during her life; to his daughter Eliza, "twenty dollars a year while she worked for him;" to his son Henry (the accountant), two horses, a wagon and harness, after the death of his widow. Following these bequests is a devise over to his children in these words:

"After my wife's death all my remaining personal property, after my son Henry taking his share before mentioned, to be appraised and sold. And also after my wife Barbara's decease, my real estate to be appraised and sold to the best advantage, and to be equally divided between my three heirs, Ann, Eliza, and Henry."

When personal property is bequeathed to one for life, with remainder over, the rights of the remainder man are to be ascertained by consulting the instruments which evidences the gift; they are governed entirely by the intention of the donor therein manifested, and by the character of the property bequeathed. If an intention can be collected from the will that the property is to be enjoyed in specie, as it existed at the death of the testator, it is not to be converted into money and the interest merely

paid to the first taker, because that would diminish the value of the gift to the favorite object of the testator's bounty, and preserve its entire value to the party to whom it is given over. Besides, it is a well settled rule of construction that when a time is named in a will for the conversion of property bequeathed for life, it is thereby clearly indicated that there shall be no sale or conversion before that time. *Alcock v. Sloper*, 2 My. & K. 699; *Daniel v. Warren*, 2 Y. & C. 290; 2 Lead Ca. Eq. 392.

In the direction that his property should be appraised and sold after his wife's death, the testator forbid that it should be done before the happening of that event.

A large proportion of the personal property bequeathed to the widow consisted of grain, hay, fat hogs, and the like. In regard to such property the law of this State is the same as the civil law. *Garman v. Garman*, 3 Casey, 118. By that a bequest of personal property for life, gave to the donee the right to consume such articles as could not be enjoyed without consuming them, and a right to wear out such as could not be used without wearing out. No use can be made of such articles as grain, or money, or wine, without disposing of them. The grain must be sold or spent in the family, or sown upon the land. Whoever has the right thus to dispose of the things themselves has the right of property in them. Rutherford's Institutes, 129.

From the character or nature of the property bequeathed, and from the spirit and language of the bequest it is manifest that the testator intended to give to his wife the use without liability on her part or that of her representatives to account for the property or its value, except as to so much as might remain not used up nor consumed at her death. The bequest over was of what should remain at the death of the widow. The words "my remaining personal property," clearly refer to what may be left at the time indicated, for distribution among the children of the testator.

The legatees to whom the property is given over cannot know, until the death of their mother, the value of the gift to them. They have no certain interest in the property—they cannot control the use of it by the donee for life, neither can they call for an account or compel distribution.

If the administrator had refused to deliver the property to the donee for life, she could have recovered of him its full value without security. *Kinnard v. Kinnard*, 5 Watts, 108; *Garman v. Garman*, *ut supra*. The legatees over have, therefore, no right to complain that he has not charged himself with it as assets in his hands.

We now proceed to consider the exceptions to the account, as

filed by the widow and allowed by the auditor. When letters were granted to the son Henry, the accountant, he was not yet nineteen years old and was living with his mother upon the farm devised to her for life. The personal property in question was then upon the farm, and was used by the mother and son just as it would have been used if no letters had been granted to him. He sold part of it, consulting his mother in regard to the sales, and paid debts and expenses with the proceeds. But before he attained his majority the letters were revoked by the Register's Court, on the ground of his non-age.

The mother was entitled to administer upon this estate, but she declined to take letters, and allowed her minor son to take them. It was her duty to have seen to it that he, being incompetent in the eyes of the law to control and manage his own affairs, should be provided with a guardian to look after his interests. Instead of doing this, she permitted him to manage her property and to exercise powers which he could not have done without her consent. He is therefore to be considered as her agent, and being an infant at the time cannot be made liable for losses happening by reason of his lack of judgment and discretion or otherwise. For property retained by him after he became of age she may have a remedy, but not in this form. All we now desire to say is, that under the facts disclosed in the report of the auditor the administrator cannot be required to account to his mother *as* administrator.

It was suggested by the counsel for the mother and sisters of the accountant, that unless he is compelled to account like one competent to bind himself by contract, the sureties in the administration bond will be discharged. To this it may be answered, that the consequences to others are not to be taken into consideration in determining whether an infant is entitled to shield himself from his obligations by interposing a plea which is a mere personal privilege, and a full protection in law.

The auditor having charged him as administrator, with the whole personal property of the estate, his restating of the account is set aside, and the exceptions thereto, except the last, are sustained.

TWENTY-EIGHTH JUDICIAL DISTRICT.

Composed of the counties of Mercer and Venango.

Court of Common Pleas, Venango County.

THE BOROUGH OF OIL CITY v. THE CITY OF OIL CITY.

1. When two boroughs and part of a township are constituted into one municipality by a statute silent as to the disposition of the public property within such newly created district, but expressly giving its officers control of the department, to which such property belongs, it is the right and duty of the officers to assume control of the property.
2. An action brought by the inhabitants of one of the boroughs incorporated into the municipality against the inhabitants of the whole municipality, for public property belonging to it at the time of its incorporation, cannot be maintained.
3. The property still belongs to the inhabitants for public use, under such municipal control as shall be provided by the sovereign.

Case stated.

The following are the material facts: By act of Assembly of March 1st, 1871, the inhabitants of the boroughs of Oil City and Venango City and of some adjacent districts, were constituted into an incorporation by name of the city of Oil City. Extensive powers are expressly vested in the mayor and council, including control of the fire department. Nothing is said in the act respecting the disposition of any property which formerly belonged to the boroughs. The borough of Oil City was indebted about \$48,000; and the nineteenth section of the act provides that the members of the council elected on the north side of Allegheny river shall have power annually to levy and collect a tax, not to exceed two per cent. upon all property in the city north of said river, until the debt of said borough shall be fully paid; to appoint a collector and treasurer for said tax; and also to appoint an attorney to manage all suits of the borough of Oil City, now pending, or hereafter to be brought, either by or against said borough.

At and before the incorporation of the city, the borough of Oil City owned personal property, consisting of fire engines, hose carriages, &c., purchased in 1866 for the fire department of the borough, and under the control of the burgess and council, valued at \$5,500. At the same time the borough of Venango City owned property for like purposes. The officers of the latter, upon the expiration of their offices, formally delivered its said property to the city authorities. The city authorities took possession and control of the said property which had belonged to the borough of Oil City without the consent of any one representing the borough. On March 1st, 1871, judgment

to large amounts had been obtained against the borough of Oil City, and the sum of \$4,600 of said judgment was for balance due on said property. At that time the population of the borough of Oil City was 3,000, of Venango City 2,000, and of the other districts included in the city, 1,000. The assessed value of the property of Oil City borough exceeded that of all the other districts now in the city by \$59,000.

If upon the facts the court shall be of opinion that plaintiff is entitled to recover, then judgment to be entered for the plaintiff for \$5,500, with interest from May 1st, 1871; otherwise, judgment for defendant.

Opinion by TRUNKEY, P. J. Delivered November 6th, 1871.

This action is in favor of the inhabitants of the borough of Oil City against the inhabitants of the city of Oil City; the former embraced within the latter. It appears to be a novel case. Should the plaintiffs recover, as one result, they will pay more than half the taxes necessary to satisfy their judgment. The research of industrious counsel has failed to discover a precedent in which a defunct municipal corporation has recovered the value of public property from a living municipality, which includes within its limits the territory of the former district. That there is no precedent, is no cause to defeat the action if the plaintiff has a legal existence, and has suffered injury by the act of the defendants.

The borough of Oil City was a municipal corporation, and the city is one now. The former, like the latter, was merely an agency instituted by the sovereign for the purpose of carrying out in detail the objects of government—essentially a revocable agency—having no vested right to any of its powers or franchises—the charter or act of erection being in no sense a contract with the State, and therefore fully subject to the control of the Legislature, who may enlarge or diminish its territorial extent or its functions, may change or modify its internal arrangement, or destroy its very existence, with the mere breath of arbitrary discretion. *Sic volo, sic jubeo*, that is all the sovereign authority need say. *Phil. v. Fox*, 14 P. F. Smith, 169. A public corporation, as thus clearly described by Sharswood, J., may be empowered to take or hold private property for municipal uses; and such property is invested with the security of other private rights. 2 Kent's Com. 275. While the municipality exists, it enjoys rights and is subject to liabilities like a private corporation. Concerning the rights of private corporations, so vested as to be beyond the control of the Legislature, it is useless to inquire in the pending case. Nor need we consider whether the legislature may constitutionally dissolve a municipal corporation, which is in debt, without any provision in favor of its creditors. Such an unjust act has not been

attempted. Provision has been made for the payment of the debts of the borough of Oil City quite as favorable to her creditors as they formerly possessed.

"According to the old settled law of the land, when there is no special statute provision to the contrary, upon the civil death of a corporation, all its real estate remaining unsold, reverts back to the original grantor or his heirs. The debts due to and from the corporation are all extinguished. Neither the stockholders, nor the directors or trustees of the corporation can recover their debts, or be charged with them in their natural capacity. All the personal estate of the corporation vests in the people, as succeeding to this right and prerogative of the crown at common law." 2 Kent's Com. 307. This rule as to private corporations has become obsolete. It is said that it never was applied to insolvent or dissolvent money corporations in England. And it may be considered as settled in this country that the death of a corporation no more impairs the obligation of contracts than the death of a private person; and that the property of a money corporation constitutes a trust fund for payment of creditors and stockholders.

It is not settled that the rule is obsolete as to public corporations. Perhaps creditors have a right under the constitution, to payment, but beyond this all public corporations are under absolute legislative control. They cannot be dissolved by the mere will of the inhabitants; nor by their neglect to elect officers; nor by non-use or misuse of their franchises; but only by statute, or by the courts in pursuance of statutory directions.

Welch v. St. Genevieve, 16 A. L. R. 512. In case of dissolution, there are no stockholders who can set up a claim to the property. The tax payers and inhabitants of a borough have a common interest in its streets, walks, parks, halls, fire engines and other property; but when the charter is repealed, or materially modified, there is no trust fund for public distribution—the property still belongs to the inhabitants for public use, under such municipal control as shall be provided by the sovereign.

Superseding the borough charter by a city charter, with enlarged powers and enlarged territorial extent, does not deprive the people of their property for the very uses intended. When two boroughs and part of a township are constituted into one municipality, by a statute silent as to the disposition of the public property within such newly created districts, but expressly giving its officers control of the departments to which such property belongs, it is the right and duty of the officers to assume control of the property and provide for the public weal and safety.

Of the districts now composing the city, one of the boroughs

may have been in debt, the other not ; each may have personal property in its fire department, the township none—the Legislature, for the common good, constituted them into one district, with one government ; and the individuality of the former districts has become extinct, except as provided by statute. Without special provision one does not exist with power to retain and sell public property for payment of its debts ; nor does the other with like power for distribution among its inhabitants. A special provision for levying and collecting taxes for payment of the debts of the borough of Oil City, and for the prosecution and defence of suits for rights and liabilities existing at the time its charter was superseded, must be followed. The Legislature has directed how money shall be raised to pay these debts. The city is not made liable by express enactment to pay them, nor to pay for property belonging to the old districts. No legal liability is implied. Expression of the manner in which the debts shall be paid, and suits prosecuted and defended, excludes all implication. In our opinion this action cannot be sustained, and judgment must be entered for defendant.

W. J. Galbraith Esq., for plaintiff.

Ash & Sterritt for defendant.

[Legal Gazette, Dec. 15, 1871, Vol. 3, p. 407.]

Court of Common Pleas.

COULTER et al. v. BORTNER et al.

Where a testatrix bequeathed personal property to a trustee "to apply it to the maintenance and support of Ann Coulter, her husband and family, as in his opinion is fit, at such times and in such amounts as he may determine, and the same not to be at any time liable to the debts or contracts of the said Josiah Coulter in any way or manner whatever," and the trustee took a conveyance of a tract of land to himself, "in trust for the use of Ann Coulter, with Josiah Coulter and family," and placed them on the land, where they resided until her death.

Held, that the trust was a valid one, that there was no conveyance of the land, or delivery of the personalty to the *cestui que trust* by the trustee, and that a conveyance of the land in fee simple by Josiah Coulter and wife was invalid, and passed no title to their vendee.

Case stated.

Opinion by TRUNKEY, P. J.

The estate of Margaret Campbell consisted of personal property. By her will, Moses Jenkins was appointed executor, and the property given to him as trustee. He took a conveyance, dated March 30th, 1825, of a tract of land in payment of a debt

owing to the estate, to himself, as executor of the estate of Margaret Campbell, deceased, in trust for the use of Ann Coulter, with Josiah Coulter and family, and immediately placed them on said land, where she resided until her decease in October, 1867. On May 12th, 1867, Josiah Coulter and wife executed a fee simple deed for thirty acres, part of said tract, to Philip Bortner; a part of the consideration being the note upon which this action is founded. Had they power to convey the land?

The testatrix gave the legal title to the estate to the trustee, who was to perform certain duties for the objects of her bequest. Absolute control over the estate is given him, with power "to apply it to the maintenance and support of Ann Coulter, her husband and family, as in his opinion is fit, at such times and in such amounts as he may determine, and the same not to be at any time liable to the debts or contracts of the said Josiah Coulter in any way or manner whatever."

A special trust is given to Moses Jenkins, to hold for the use and support of a married woman. This is the motive, and to carry it out the will creates an active and operative trust, not a mere passive or technical one. Since the decision in *Burnett's Appeal*, 10 Wright, 392, there has been no question as to the validity of such trusts, when for the benefit of others as well as *femes covert*. Although personal estate, it cannot be taken from the trustee—his right and duty are to hold and use it as directed by the will. Where a testator devised an estate to his executors in trust, to invest in stock, or put it at interest and apply the income to William Wilson's use, or pay him the whole or part of the principal at their discretion, it was held that William Wilson, or his committee, he having been found a lunatic, had no right to demand and take the money or trust out of the hands where the testator had placed it, the testator had a right to appoint his own trustee. *Wilson's Estate*, 2 Barr, 329.

Words in a will, which in relation to land would create an estate tail, give an absolute right to chattels. 11 Harris, 10, 388; 6 Casey, 118, 180. But in this will there is no right of possession given save to the trustee—no power of disposition in the *cestui que trust*—no right of control, unless the trustee in his discretion, determines to give her the property. No one, as of right, could demand any portion of the estate from the trustee beyond such sums from time to time as were necessary for the support of Ann Coulter and family. To this extent, and no farther, was it the trustee's duty to pay. Anything more would be a moral, if not legal violation of the directions in the will. Had he in 1825, or within many years afterwards, given this personal estate to Ann Coulter, it would at once have vested in Josiah Coulter, and have been liable for his debts and contracts, the very thing expressly prohibited.

It was conceded in argument, and correctly, that by reason of the prohibition as to Josiah Coulter, no estate vested in him while the trust remained unexecuted. The use was in Ann Coulter, and the trustee could have given her the money in her lifetime if he had thought best, for such is the power. Had he so determined, in good faith, the "family," after her decease, would have no claims upon him. "The word family, when applied to personal property, is synonymous with kindred or relations. This being the ordinary acceptation of the word family, it may nevertheless be confined to particular relations by the context of the will, or the term may be enlarged by it, so that the term may in some cases mean children, or next of kin, and in others may even include relations by marriage." Bouvier's Law Dict. I cannot doubt the word family in this will means children. Perhaps the children of Ann Coulter, as the equitable owners of the estate, whether it be real or personal, are now entitled to its possession, control, and disposition, but this is not material to the question.

The trustee took a conveyance of the land in trust as executor of the estate; he holds it for the purposes and uses stated in the will. He could have been compelled to account for the money invested in this land. The power was not given him, and he had not the legal right to convert personal to real estate. The *cestui que trust* was not bound to acquiesce in such conversion for over forty years. She, with her husband and family, immediately went on the land, and have used it and occupied it as they only could have done had the testatrix owned it at the time of her decease, so that by the will it could have vested in the trustee for her use. Instead of such acquiescence and use, she could have refused and demanded of, and compelled the trustee to pay her the money necessary for her support. The trustee invested the personal estate to the satisfaction of the *cestui que trust*, so that it was not liable to the debts or contracts of Josiah Coulter, so that she, her husband and family, received the use for their support. Being so long acquiesced in she has the equitable right to the real estate, and without doubt she, if living, or having deceased, her heirs can elect to keep it. She could not dispose of it, however, during coverture, for it is well settled that a married woman cannot convey an estate vested in a trustee for her sole and separate use, unless authorized to do so by the instrument creating the trust. After the death of the husband she may convey.

In reference to the duties of Jenkins, as trustee, no reason exists why he should have conveyed the land to Ann Coulter. If it was not his duty to give her the money when not required for her support, certainly it was not to give her the legal title to the land purchased with the money. No presumption even

arises that a conveyance was made by a trustee when it was not his duty to convey. Had he conveyed the legal title to her in 1825, a life estate would have vested in her husband, liable for his debts and contracts.

The trustee holding the legal title for the uses expressed in the will, permitted the *cestui que trust* to occupy the land. If, at any time becoming dissatisfied, she should refuse to occupy, she could not hold it on other terms; nothing but the act of the trustee, as in his opinion he should determine and think fit, could vest the money absolutely in Ann Coulter, or the land as the equivalent for the money. He never gave the one nor conveyed the other.

Whether the land, purchased with the trust funds, stands in the place of, and passes as personal estate, in the hands of the trustee held under the will, or as real estate conveyed to a trustee for the separate use of a married woman, the conclusion is the same, that Josiah Coulter and wife had no power to give a good title for the land attempted to be conveyed to Philip Bortner, and on the case stated, judgment must be entered for defendants.

[Legal Gazette, Sept. 10, 1869, Vol. 1, p. 83.]

Court of Common Pleas.

LEWIS v. PAINE et al.

1. Where a creditor levies an attachment execution on a debt, which by the answer appears to be due by the garnishee to a partnership, of which the defendant is one of the partners, he will not be entitled to judgment upon it.
2. In such case the creditor's only right is to that part of the debt which would belong to the defendant after the payment of the partnership debts and settlement of the partnership accounts.

Opinion by TRUNKEY, P. J. Delivered October 8th, 1869.

Attachment execution.

D. H. Lewis, holding a judgment against S. H. Paine, issued an attachment execution, which was duly served upon Hugh Danver, as garnishee. In his answers the garnishee admits an indebtedness of \$150, due on a judgment in favor of S. H. Paine, for use of Paine & —. The testimony of Paine shows that the claim was assigned to Johnson & Paine before the commencement of suit against Danver, and before the attachment was issued—the firm being composed of J. Ablett & S. H. Paine, as general partners, and George N. Speir, special partner. Without raising any controversy as to the facts, the counsel have submitted the question, will an attachment execution, duly served upon a debtor of a partnership firm, hold

the money for an individual debt owing by a member of the firm to the attaching creditor?

It has been held that a partnership debt owing to a firm is liable to be attached by process of foreign attachment in a suit brought against one of the partners to recover a private debt due by him; and judgment for a moiety of the money was rendered in favor of the plaintiff in the attachment. *McCarty v. Emlin*, 2 Dallas, 277; 2 Yeates, 190. Also, when the sheriff can seize partnership goods under this process it is his duty to do so without regard to the rights of the other partners. *Moyan v. Watmough*, 5 Whar. 125.

It is exceedingly difficult to reconcile these cases with the principle that a creditor of one partner can secure to himself by attachment and levy only the interest of his debtor remaining after final settlement of the partnership accounts. Whatever, formerly, may have been the power of a creditor of one partner to levy his debt of the partnership effects, he is now restricted to the interest only of his debtor to the whole stock of the firm. Each partner has an entire interest in the whole of the joint property, and not a separate interest in any part of it. A levy, on execution against one partner, cannot touch a specific proportion of the goods, nor the whole. "The only levy that can be made, consistently with the relation the partners sustain to the goods, is of the debtor's interest in the whole, and that is to be measured by final account." *Deal v. Bogan*, 8 Har. 234. See Par. on Part. 350-3.

Debts due to the firm are as much the property of all the members, and as necessary to enable the firm to first liquidate its liabilities, as the stock in trade. To permit a creditor of a partner to attach and receive the whole, or a specific part of a firm debt, is repugnant to well settled principles. It is possible some good reason exists for this in case of foreign attachment not applicable to other cases. The foreigner is beyond the jurisdiction of the court, and an exception may exist in order to compel his appearance. Where all the parties are within the jurisdiction of the courts of this State, there can be no necessity for seizing and appropriating a specific part of a debt owing to a firm, when a like proportion of the goods could not be touched. However, even in foreign attachment the doctrine in *McCarty v. Emlin*, and *Moyan v. Watmough* may be overruled by the case of *Lucas v. Laws et al.*, 3 Casey, 211. True, no reference is made to these cases, but the opinion is entirely inconsistent with them. This case called in question the validity of a foreign attachment to hold a firm-debt on a claim against a partner, and it is clearly stated by the court, that when the interest of one partner in partnership property passes to another person, by private or judicial sale, attachment,

or otherwise, such person takes nothing more than an interest in the assets of the partnership, not tangible, not available, but under an account, and one item of the account is, that enough must be left for the partnership debts. It was held that the attachment was not a bar to the plaintiff's recovery against Lucas, the garnishee, and that if the attaching creditor had any remedy it could only be by an account between the partnership and the partner whose interest had been attached.

Believing that this is the law applicable to all like cases, especially to the one in the question submitted, judgment upon the answers will be refused.

[Legal Gazette, Nov. 19, 1899, Vol. 1, p. 164.]

Court of Common Pleas, Venango County.

IN EQUITY.

SQUIRES v. RIDGEWAY.

1. Where a party seeks to enforce a trust, which the bill shows is not manifested by writing, the defendant may take advantage of the act of 1856 by demurrer.
2. Even though the defendant should admit the agreement to hold as trustee, if at the same time he insists on the bar of the statute, it is a good defence, unless the bill discloses fraud other than the mere breach of the agreement.
3. A trust cannot be established on the ground that the holder of the title took as agent, unless it is likewise averred and shown that the consideration was paid by the alleged principal.

Opinion by TRUNKY, P. J.

The first paragraph of the answer avers that the matters charged in the bill are not sufficient in law to entitle the plaintiffs to the relief prayed for; because the alleged trust is not manifested by writing, and is void under the act of April 22d, 1856; and that the alleged contract between Esther Squires and P. T. Ridgeway is within the statute of frauds.

By writing filed, the parties agreed that said paragraph be treated as a demurrer, in due form, to the bill, and the agreement was made accordingly. In case the demurrer is allowed, it will avoid the labor and expense of a protracted investigation of the facts in dispute. For this reason the case will be now decided as we understand the law. If upon review, the decision shall be found to be erroneous, the parties can turn their attention to the facts, knowing the result will depend on their determination.

The allegations in the bill, in substance, are as follows:

1. William Cundy, assignee to P. T. Ridgeway, on August 28th, 1868, in consideration of \$5,000, one-fourth of the working interest in four leases and lots on the McMillan farm, for the term of twenty years, with all engines, tools, machinery,

and property thereon; also he withdrew and settled a bill in equity against Ridgeway and Squires, and released Ridgeway from all rights of action for profits, or anything connected with said leases.

2. The aforesaid assignment, settlement, and release, were intended to be in trust for Esther Squires. She had orally contracted, a day or two before the date of the writing, with Cundy, for the purchase of all said property, for the sum of \$5,000.

3. Said Esther is a sister-in-law of Ridgeway, and she reposed confidence in him to conclude the purchase of said property from Cundy. Ridgeway agreed to conclude said purchase as her agent, and to take the writings in such form as to show that he held in trust for her.

4. That at the time of the said purchase from Cundy, there was oil, and money received from the sale of oil, produced from said interests, in the hands of said Ridgeway, about \$4,000 or \$5,000, which belonged to said Esther by virtue of the purchase; and it was agreed said oil and money should be applied to the payment of the purchase money to Cundy, and if not enough, Ridgeway was to advance the balance, and be reimbursed out of the proceeds of the property, and then convey the property to said Esther.

5. Ridgeway fraudulently contrived to get an assignment of the property from Cundy to himself, although Cundy intended to, and supposed he did, convey in trust for said Esther.

6. Ridgeway pretends he purchased the property absolutely for himself, and denies the alleged trust.

Fraud is charged in the obtaining of the assignment, but no fraudulent act by Ridgeway is stated, except the violation of his agreement. It is a familiar principle that unless there be something in the transaction more than is implied from the violation of a parol agreement, equity will not decree the purchaser to be a trustee. Here there is no allegation that Ridgeway, by word or act, deceived Cundy, and induced the assignment; nor is it averred that Cundy did not know the contents of the writing. The bill and Exhibit "B" show a settlement of litigation between Cundy and Ridgeway, a transfer of the property in dispute, and release of the cause of action, for the sum of \$5,000 paid to the claimant. The consideration paid was in full of the matters claimed in the suit, as well as for the conveyance of the interest in the leases. This appears to be a fair transaction, and will not be overthrown unless fraudulent acts be set forth as well as charged. It is useless to inquire if Ridgeway was to assign to Esther Squires the rights of action against himself; or what was to become of the equity suit after he should be reimbursed his advancements; or, if only the interest in the leases was to be assigned, and if she was to pay

therefor the whole sum of \$5,000; for no specific acts of fraud are charged in the bill.

It is contended, that when the answer confesses the parol agreement, specific performance will be decreed. This is so if the statute is not relied on as a defence. But "the doctrine is firmly established, that even where the insured confesses the parol agreement, if it insists, by way of defence, upon the protection of the statute, the defence must prevail as a competent bar." 2 Story's Eq. Jur. § 757. Here the plaintiff shows that the defendant denies the trust; and the demurrer is rested upon the statute. He may insist upon the statute as a good defence in law, although the demurrer admits the argument as alleged in the bill.

The remaining point is the alleged agency. "Where a man employs another as his agent to buy an estate, and the latter buys it in his own name, and no part of the purchase money is paid by the principal; if the agent deny the trust, and there is no written evidence of its existence, it cannot be enforced against him; for that would be in the teeth of the statute of frauds." Hill on Trustees, 96; 2 Story Eq. Jur. § 1201, a. The whole foundation of the trust is the payment of the money, and that must be clearly proved. "If, therefore, the party who sets up a resulting trust, made no payment, he cannot be permitted to show by parol proof, that the purchase was made for his benefit, or on his account. This would be to overthrow the statute of frauds." *Bellford v. Bun*, 2 Johns. Ch. R. 405.

It is not alleged that Esther Squires paid a dollar of the purchase money. At the time of the purchase she had no money in Ridgeway's hands, she gave him none, and has not paid, or offered to pay him any part before or since the purchase.

The plaintiffs allege a contract with defendant, by which she was to have the use and benefit of his purchase with his own money, without any payment whatever by her to him, or any one else. If the purchase turned out well, he could pay himself out of the products of the property; if worthless, he would lose his money. In no event was any actual consideration, present or prospective, to move from the plaintiff. It seems the property was productive, and the defendant has in his hands of the product, and of the property at time of purchase, a considerable sum in excess of the purchase money. If there is no binding trust, it all belongs to him.

We are of opinion that the nude, oral agreement, or the trust alleged in the bill, cannot be enforced against the defendant, and the demurrer must be allowed.

Bill dismissed.

H. C. Johns and *J. H. Osmer, Esqs.*, for plaintiffs.

F. D. Kinnear, Esq., for defendant.

[*Legal Gazette*, Aug. 11, 1871, Vol. 3, p. 263.]

TWENTY-NINTH JUDICIAL DISTRICT.

Composed of the County of Lycoming.

Court of Oyer and Terminer.

COMMONWEALTH v. BRITTON.

1. The preliminary proof necessary before dying declarations can be given in evidence, is that the declarant was about to die and knew his condition. The knowledge of declarant of the fact of his condition can be shown by evidence of the nature of his wounds, or the advice of his physician, as well as by his express declarations.
2. In an indictment for murder by stabbing, where the commonwealth proposed to ask a witness what threats, if any, the prisoner made at a former time, in regard to killing any man whom he saw coming to the witness' house, at the same time saying he carried a knife for the purpose and showing it,
Held: Such question was competent to show degree of guilt.
3. Temporary separation of one or more of a jury empanelled to try a capital case, the trial of which extends over days and even weeks, is a necessary incident to such a trial, and although it is to be regretted, is not a reason for a new trial, where the jurors were always under the care and surveillance of the sworn officers of the court.
4. Where the defence alleged that during such separation the jurymen conversed about the case on trial with persons not jurymen, the court will order testimony to be taken, and if it appear that the reason for and circumstances attending each of such separations are explained and that the jurymen were always in the custody of the bailiff of the court and did not hold any communication with any one but themselves about the case on trial, a new trial will not be granted.

Opinion by GAMBLE, P. J. Delivered January 9th, 1871.

Sur motion for an arrest of judgment and for a new trial in the case of Lloyd Britton.

The following five reasons have been filed and argued with earnest ability by the counsel for the prisoner in support of a motion in arrest of judgment and for a new trial.

Their consideration and decision have impressed upon the court a duty of the most grave responsibility, to the faithful discharge of which we have devoted a careful and mature consideration, and now proceed briefly to declare the conclusions resulting from such investigation. As the first, second, and fourth reasons assigned for a new trial are founded upon alleged errors of the court, we propose first to consider them.

The first is—That the court erred in admitting the evidence contained in the defendant's first bill of exceptions. This evidence consisted of the declaration or statement of the deceased in relation to the homicide, made under the declared apprehension of immediate death. As a general rule evidence must be delivered under the sanction of an oath in the presence of the parties or with an opportunity of cross-examination. The solemnity of an oath is fearful to a mind and conscience capable

of a just appreciation of all it comprehends. It is a solemn imprecation of the vengeance of Almighty God upon the witness if he speak not the truth under its sanction. Such a safeguard for the protection of truth should not be dispensed with, except in cases of necessity, and where the situation and circumstances of the party are so solemn and so awful as to create an obligation equal to that imposed by a positive oath administered in a court of justice. Can a man be thoughtless or indifferent to his responsibility, when he stands upon the brink of the grave? Can a mind sincerely impressed with the apprehension of immediate death harbor malice and connive at falsehood? Or is it not rather the hour when the most obdurate enmity melts into forgiveness? When hatred, and passion, and avarice skulk away abashed from the presence of the king of terrors. When every motive and temptation to falsehood are gone. When the life is trembling in an unequal balance and the judgment-seat is in view, if truth is not then in the human heart, when and where can it be found? Such are the circumstances which the law esteems equivalent to the solemnity of an oath, and admits in evidence declamations made "*in extremis*" or "*in articulo mortis*," without the sanction of a formal oath.

The admissibility of such declarations is not, however, understood to be disputed by the counsel for the prisoner, but it is denied that in this case the necessary preliminary proof was made in order to render them admissible.

The rule as defined by Mr. Peake, in his excellent compendium of the law of evidence, is that such declarations must be made under the *declared apprehension* of death, or in such imminent danger of it, as must necessarily have raised that apprehension in the mind of the declarant.

Mr. Wharton, in his treatise on American Criminal Law, says, dying declarations are always admissible when death is the subject of the charge, and must have been made under a sense of impending dissolution. That it is not necessary to prove *expressions* implying apprehension of immediate danger, if it be *clear* that the party does not expect to survive the injury, and it appear to the court that they were made under a sense of impending dissolution. And that the principle is not affected by the fact that death did not ensue until a considerable time after the declarations were made. These principles are recognized and sanctioned by our Supreme Court in the recent case of *Kilpatrick v. The Commonwealth*, 7 Casey, 198. Judge Strong, in delivering the opinion of the Court, says: "Such declarations are inadmissible unless at the time declarant made them, he was in actual danger of death, unless he believed death was impending not distant, and unless death actually ensued. It is enough if it satisfactorily appears, in any

mode, that they were made under that sanction, whether it be directly proved by the express language of the declarant or be inferred from his evident danger, or the opinions of the medical or other attendants stated to him, or from his conduct, or other circumstances of the case, all of which are resorted to in order to ascertain the state of declarant's mind." It may be remarked that in that case the deceased, John McCracken, was stabbed in the abdomen by Kilpatrick, and survived nine days.

We will now refer to the preliminary proof in this case before any of these declarations were admitted. For, although the proof was afterwards corroborated and strengthened by the attending physicians who stated that his system never rallied, that they never encouraged any hope of his recovery, and that he never seemed to entertain any such hope himself, and by several other witnesses who heard him repeatedly declare his sense of impending death, yet we will only consider the evidence as it stood when the first declarations were admitted.

Dr. Detwiler had proved that he was one of the three attending physicians, that he first saw the deceased about ten o'clock on the night of the 16th of November, lying upon the floor with a punctured wound in the abdomen, from which the omentum was protruding. That they probed the wound and found it to be the full length of the probe three or four inches in depth. That three physicians continued to attend him until his death, and that he died on the 23d of November, from the effects of this wound.

Jacob Cast proved that Britton and Bay had been talking together in the bar-room, that Britton left first, and in a minute or so Bay went out, that in about fifteen minutes after, they heard a noise and rushed to the door, when Bay came in saying that he was stabbed, that witness saw a hole in his abdomen that he could put his finger in. That he first tried to sit upon a chair and could not, and then laid down upon the floor, exclaiming "I am a dead man." That he first said to send for Doctors Detwiler and Crawford, and then said it was no use to send, for he would die before they could get there.

He was then asked who had stabbed him and how it happened. He answered that Lloyd Britton had stabbed him. This witness then left to go for a doctor, and heard no further particulars as detailed by Bay, on that occasion. Other witnesses who were present, heard him repeatedly say that he must die, and could not survive, that he described where he had been stabbed and by whom, and that Britton had jumped over the fence and ran across the fields, and urged them to make immediate pursuit.

It would seem from this evidence that the declarant believed

death was impending and not distant. That the wound was fatal, and the danger therefore actual and imminent, and that death did actually ensue. These are the prerequisites, to constitute dying declarations, and make them evidence against a defendant in a case of homicide.

Such evidence has always been admissible, and the necessity of the case renders it eminently proper and right, otherwise murder would often escape punishment. Indeed we fail to see any reason why these declarations, made immediately after the occurrences, were not evidence as a part of the *res gesta*, independent of the apprehension of immediate dissolution.

The second reason assigned for a new trial is, that the court erred in admitting the evidence contained in defendant's second bill of exceptions.

The offer to which this exception applies was as follows: "The commonwealth's counsel propose to ask the witness, Christina Thompson, what threats, if any, did Lloyd Britton make during the last summer or fall in regard to killing any white man whom he saw coming to your house, at the same time saying that he carried a knife for that purpose? 2d. Did he also, at the same time show you the knife?"

This offer was objected to by the counsel for the prisoner. 1st. As being too vague and indefinite. 2d. Because the threats were against the deceased, and 3d, because irrelevant.

The stage of the trial and condition of the proof at the time this offer was made becomes important in the consideration of its admissibility. The *corpus delicti* had been proven by the most clear and unequivocal evidence. There was also evidence that the deceased had been twice at the house of Mrs. Thompson, shortly before the occurrence. That the prisoner had seen the deceased come out of the house the first time and had said, "that shall be the last of him." That in the interval between the first and second visit, the deceased and the prisoner had a long interview, apparently friendly and confidential. That at the second visit the deceased informed Mrs. Thompson that the prisoner "gave her a bad name." That immediately after the deceased left the house the second time, a cry of murder was heard, and blood was found in the road near the house, and by the dying declaration of the deceased it was in evidence, that the prisoner had stabbed him near Thompson's house.

It was the duty of the jury, not only to pass upon the guilt or innocence of the prisoner, but if guilty, to determine the degree of the guilt. If murder, perpetrated by lying in wait, it was of the first degree by positive enactment. Or if done wilfully, deliberately, and premeditatedly, with intent to take life, it was murder of the first degree. If maliciously and with intent to do great bodily harm, but not with intent to take life,

it was murder in the second degree. Hence every circumstance which had a direct bearing upon the questions of lying in wait, malice, deliberation, premeditation, and intent to kill, was clearly evidence. We think the evidence embraced in the offer under consideration had such bearing and was corroborative and explanatory of the threat already in evidence. And although not a threat or menace against the deceased in particular, it was a threat against him or any other white man who should place himself in a position to incur its penalty. It had, therefore, clearly a bearing upon the animus and motive of the prisoner, and upon the questions of deliberation and the intent with which the fatal blow was struck. The objection to its remoteness and indefiniteness is in our judgment wholly removed by the proof of its substantial repetition and its specific application to the deceased just before the occurrence.

It is not necessary to quote authority "that the declarations of a prisoner made at a *former time*, are admissible where they tend to prove the intent of the party at the time of the commission of the offence." Nor that, "in cases where the intention forms a principal ingredient in the offence, a wider scope is allowed."

Mr. Wharton, in his *Compendium of American Criminal Law*, at the close of section 727, devoted to this class of evidence, cautiously remarks as follows: "Perhaps the sound view of this species of evidence is, that while it ought not to be received to establish the fact of guilt, it is *proper* to indicate the grade of the offence."

We dismiss the foregoing reason with less regret, because they are subject to review by a higher tribunal, in which any errors we may have committed will be corrected. But not, however, without a careful review, and a most conscientious conviction, that no injustice has been done to the prisoner.

The next reason in the order we have proposed to consider them, is as follows:

4th. Because the court erred in their charge to the jury, in commenting upon the evidence of John Bolden.

We do not suppose that the fact of the court commenting upon the evidence of any witness in the cause is claimed as error *per se*, but that the alleged error consists of improper comments—and it was understood in the argument in support of this reason that it was the few comments not contained in the written charge to which exceptions were taken. These comments were well remembered and have since been reduced to writing and appended to the written charge. They were elicited and in the judgment of the court required from the comments of the counsel both for the commonwealth and for

the prisoner, upon this evidence after this part of the charge had been written. In order that it may appear whether the prisoner has any reason to complain of these comments, it will be proper to refer to the conflict between the evidence of Bolden and the evidence of Mrs. Thompson, Mr. and Mrs. Haas, Kast Shroeder and Peter Miller, more particularly than it was deemed necessary to refer to it in charge to the jury.

Kast, Shroeder and Haas agree that it was about seven o'clock or a quarter before, according to Haas, when Kast and Shroeder left to go to town, leaving Bay at Haas' tavern. Haas says that when Kast and Shroeder left, Bay went out and was gone about twenty minutes. Mrs. Thompson and Barnard Thompson think it was between six and seven o'clock that Bay came to their house the first time, that he was only there a few minutes, perhaps ten, and Mrs. Thompson says that about five minutes after Bay left, Lloyd Britton came to the door and got his tools, the chisel and screw-driver. Haas says that after Bay came back to his house, Britton came in with a chisel and screw-driver, and that he and Bay talked together in a low tone of voice, and familiarly, a good while, and then Bay treated Britton to a glass of cider, and they sat down again and talked until some time after Kast and Shroeder returned from town. Kast and Shroeder fix the time of their return at eight o'clock, and both say that Bay and Britton were talking together when they came in, and continued to talk together for some time after. That Britton went out first and Bay soon after, and in about fifteen or twenty minutes Bay came back stabbed.

Mrs. Thompson says that it was after Kast and Shroeder returned from town that Bay came to her house the second time, that he was there but a few minutes, and that immediately after he went out she heard the scream of murder.

Peter Miller says that he lives out beyond the poor house; that he left home that night just ten minutes before eight o'clock to go to church. That he walked from home past Haas' tavern; that he saw no horse and wagon then, and that all was quiet. That there was a bright light shining out of Thompson's windows, and that about sixty yards this side of Thompson's house he met Britton, recognized and spoke to him, and Britton answered. Haas says that his clock stood in the bar, but that it did not correspond precisely with the town time. With a reasonable allowance for the variation of time pieces, it would appear from this evidence that Britton came to Haas' tavern about half-past seven o'clock; that he had previously been at Thompson's and got his tools, and that he remained at Haas' tavern until after eight o'clock by Haas' time. That it must have been as late as eight o'clock by Miller's time when he met

Britton south of Thompson's house, and certainly after he had left Haas' tavern. That the stabbing occurred after eight and before nine o'clock, probably nearest the latter hour.

On the part of the defence John Bolden says that he remembers the night of the 16th of November. That on that night he overtook Britton in the road north of Haas' tavern, going in the direction of his home; that he had his pipe in his mouth; that they walked together as far as Bolden's house, which is in the hollow beyond the poor house, and a quarter of a mile this side or south of Britton's house. That when they reached Bolden's, Britton went in. That an argument arose between Bolden and his wife or some woman present, about the time of night, that he took out his watch to settle the dispute, and found that it was just fifteen minutes past seven o'clock. That Britton remained some time, and when he left started in the direction of his own home. Catharine Jenkins says that she lives north of Bolden's and on the road leading to Britton's; that on the night of the 16th of November, Mrs. Britton and Mrs. Miller were visiting at her house; that she heard Britton passing and went to the door and called him in; that he had some tools in his hand, which he laid upon a table and sat and talked a good while, and that he and his wife left together to go home.

Elizabeth Miller says she was at Mrs. Jenkins with Mrs. Britton on the night of the 16th of November; that Mrs. Britton was waiting for her husband to come to go home; that Mrs. Jenkins called to him when passing; that he came in and had tools in his hand which he laid down on the table; that his manner was as usual.

None of these witnesses were cross-examined, which, we think, is to be regretted. It will be observed that Bolden noticed that he had a pipe in his mouth when he overtook him, but says nothing about him having any tools, although he went into the house and remained a good while; that he gives a reason for noticing and remembering the hour, but no reason for noticing and remembering that it was the night of the 16th of November; that neither Catharine Jenkins nor Elizabeth Miller speak of the hour of the night, but both noticed the tools which he was carrying, when they saw him. The theory which the defence founded upon this evidence was, that when Britton left Haas' tavern he went directly north towards, and on his way home, which was in an opposite direction from Thompson's house; that Bolden overtook him a few hundred yards from the tavern, and that when he left Bolden's house he started in the direction of home, and that Mrs. Jenkins and Mrs. Miller, saw him still nearer home and saw him leave the house of Mrs. Jenkins in company with his wife for home, and

he could not therefore have committed this homicide at the time and place the commonwealth had proven that it was committed.

And to reconcile the conflict of evidence as to the time of night, suggested that Bolden might have been mistaken in the hour.

The theory of the commonwealth was that if this evidence was reliable, it proved that Britton had deceived Bolden by starting towards home, and had returned to Thompson's house, obtained the tools and then come to the tavern; and that it was after the homicide that these women saw him on his way home with the tools.

In our written charge we had referred in general terms to this conflict in the evidence as to the time when Britton went out of Haas' tavern and the time fixed by Bolden when he overtook him going home. And then added orally the following remarks, to which we understand the exception applies.

"It will be your duty to reconcile this conflicting evidence, if you can, without imputing wilful falsehood to any of the witnesses.

"It is to be regretted, we think, that Bolden was not cross-examined by the commonwealth. We should have had all the light upon this point which could have been furnished.

"Bolden fixes the time of night with apparent certainty, but does not state how he knew it was the night of the 16th of November, rather than the 15th, 14th, or 17th, that he overtook Britton going home. We have therefore no means of judging, whether or not, he was liable to be mistaken in the night."

We fail to see wherein there is any error in these comments, they were merely suggestive of another method of reconciling this conflict of evidence, for the consideration of the jury; much less damaging to the prisoner than the theory of the commonwealth; and but little, if any, more prejudicial to the defence than their own suggestion, that Bolden might be mistaken in the hour. The *hour* was just as material as the *night*, in establishing an alibi in this case; and if the witness was mistaken in either, the evidence was alike defective.

He had fixed the hour with much more certainty than he had fixed the night, and if mistaken in either, it seemed most reasonable that it was in the latter. The evidence preponderates most strongly against him, it was therefore more charitable to suggest a method of reconciling the conflict less harsh than imputing wilful falsehood to any one.

We cannot perceive that any wrong was done the prisoner, or that he has the least reason to complain of the comments upon the evidence of John Bolden.

We next proceed to consider the third reason which is as follows:

Because the jury separated during the progress of the trial, as follows:

On Saturday, December 3d, two of the jurors accompanied by a constable left the hotel where the jury boarded and visited Elliot's Academy of Music, then building, and mingled with the spectators and workmen then in the building.

On Sunday, December 4th, ten of the jurors were at church, two were walking through the streets of the city, and one visited his home.

On Monday, December 5th, one of the jurors accompanied by a constable visited the post-office, and remained in front thereof mingling with the crowd and conversing with one or more persons.

On the same day one of the jurors visited a public barber shop with a constable.

On Monday night, December 5th, one of the jurors attended by a constable was at the fire on the canal, and while looking at it conversed with persons in relation to the case."

Some of these specifications we do not regard as necessarily importing any dereliction of duty, on the part of the jury. The mere fact of an occasional, and as we feel bound to presume, necessary separation of one or more of the jurors from the rest of their fellows, in the custody and under the constant surveillance of an officer of the court, is a necessary incident, to the trial of all protracted cases, and cannot be avoided, especially where no suitable accommodations are provided in the court-house for the boarding and lodging of the jury in capital cases.

From the extreme caution and careful deliberation which an advanced civilization has imposed upon all tribunals charged with the trial of capital offences, such cases are no longer as anciently, hurried through at a single sitting. They occupy days and weeks, if necessary, of the most earnest and solicitous investigation. And jurors are no longer imprisoned and deprived of food and light until they have been coerced into agreement. A more enlightened and reasonable practice now prevails of rendering them as comfortable as circumstances will permit, consistently with that exclusion from all external influences, calculated to prejudice their minds.

In order that they might be thus preserved in this case, and in pursuance of the uniform practice in capital cases, special bailiffs were appointed by the court, whose duties were to keep constant guard over the jury, to protect them from intrusion and prevent any communication in reference to the case from reaching them, except only the evidence in the cause.—These bailiffs were selected from the constables elected by the citizens of their respective wards, as suitable persons to exercise that

important office; and were sworn to well and truly keep the jury, and neither speak to them themselves, nor suffer any other person to speak to them, touching any matter relative to this trial. With similar instructions to the jurors themselves as to the necessity of abstaining from all unnecessary communications of every kind, and especially to suffer no one to speak to them touching this case, all was done that the law requires, or that seemed to be necessary to protect the rights of the commonwealth and the prisoner, and secure a fair and impartial trial.

Ever since the trial of Stone in England in 1796, 6 T. R. 530, and the trial of Fries in the United States District Court of Pennsylvania, in 1799, 8 Dallas, 515, the necessity of adjournments with all their incidents and consequences, have been uniformly recognized—Lord Keyon observing in the former case, “that necessity justified what is compelled.” In the latter case it is stated, in an appended note, that the jury were permitted to ride into the country in a carriage for recreation, but still remaining under the charge of an officer, and within the jurisdiction of the court.

The indispensable necessity of frequent temporary separations of jurors from their fellows during the progress of a protracted trial, is too manifest to require any other justification than that of necessity. It is therefore no infraction of any rule of law, and so long as the juror or jurors thus necessarily separating from their fellows are in the custody and under the charge of an officer of the court, they are regarded as still within the surveillance and jurisdiction of the court, and does not constitute a substantial separation.

The case of *Peiffer v. The Commonwealth*, 8 Harris, 468, is relied upon by the counsel for the prisoner, as recognizing and enforcing the old common law rule with all the rigor with which it applied to trials disposed of at a single sitting, and they quote that eminent jurist C. J. Gibson as saying in that case, “that even the forms and usages of the law conduce to justice; but the common law, which forbids the separation of a jury in a capital case before they have been discharged of the prisoner, touches not matter of form, but matter of substance.” It has frequently been remarked by our Supreme Court that such general observations must always be taken in connection with the subject matter under consideration. Judge Gibson was not considering a necessary temporary separation, in the custody of an officer of the court, nor is it at all probable that he would have regarded such a necessary and usual incident to all protracted trials, as any substantial separation.

In the case of *Peiffer*, the jury, after being sworn, were permitted by consent of the counsel for the commonwealth and

the defendants, to go to their respective homes, unattended by any officer of the court, and remain thus separated for a period of five days, before the trial was resumed. That these facts constituted a substantial separation, did not admit of any controversy, the question under consideration by the court, was therefore, not what constituted a separation, in violation of the common law rule, but whether an acknowledged separation in violation of the rule, could be ordered or permitted by the *consent* of the parties. We do not regard this eminent authority as militating in the least degree against the views we have announced. Whilst we believe them to be in perfect accord with the authorities, practice and experience of our own and other criminal courts.

These temporary separations in the custody of a sworn officer must, however, be limited to the circumstances of necessity, and when so frequent as charged in this case, may require explanation, and proof that no improper influences were permitted to reach the jurors. And inasmuch as some of the specifications charged that some of the jurors had conversed with others than their fellows in relation to the case, during these periods of temporary absence, we appointed J. L. Meredith, Esq., a member of the bar, commissioner to take the evidence offered in relation to any and all of these specifications.

We have examined this evidence carefully, and find that in each instance of temporary separation, the sworn officer of the court always accompanied the juror or jurors. That the reason and purpose of the separation is fully explained, and although more frequent than we could have desired, yet we are not prepared to say that any of them were unnecessary, and therefore censurable.

In reference to the charge of mingling with the crowd at the post office and conversing with one or more persons there, the proof in support of the charge is that a juror in company with one of the constables was seen standing in the post office, and that while thus standing, two or more persons approached the juror, that their lips were seen to move as if in conversation, but that no conversation was heard. This is fully explained by the constable and the juror, and also by another juror who was in company with them. Their object in visiting the post office is stated, and the fact that they were spoken to merely in recognition by the two relatives of one of the jurors, and by another person who desired to pay some money that he owed, but that all were promptly forbidden both by the jurors and constable from entering into any conversation upon any subject whatever with either of the jurors.

In support of the charge that one of the jurors in company with a constable visited a fire, which occurred on Monday

night, December 5th, during the progress of the trial, and while there conversed with persons in relation to the case. One witness testifies that he saw the juror and the constable standing looking at the fire; that he and a young man whom he did not know addressed some remarks to the juror, and the juror replied; and then says, "what remarks or conversation may have taken place I am unable to state; further than that I heard the name 'Britton' pronounced not less than twice by Mr. Calvert and the young man referred to, my recollection is that Mr. Calvert remarked, you must not talk Britton to me."

How far this evidence would sustain the charge against the juror implicated if unexplained might be questionable, for it does not profess to be a detail of what conversation did take place but rather an indistinct recollection of an imperfectly heard remark in which the name of the prisoner was used.

But Mr. Calvert, the juror implicated, states that he saw the light of the fire from the window of the room occupied by the jury, and from its location apprehended that it was near his residence; that he sent the constable to ascertain its location, and on his return learned that his apprehensions were well founded. He then requested constable Cassidy to go with him to his house that he might secure some money and valuable papers belonging to the gas company, for whom he was collector; that when they approached the vicinity of the fire, and before they entered his house, he saw the witness, and Mr. Deibert and four others standing looking at the fire; that the witness remarked that the fire was under control and that there was no further danger, to which the juror responded that he was glad to hear it; that he and the constable entered his house, in company with the constable he secured the valuables which had caused his anxiety, and that on their re-entering the street or alley, Mr. Deibert approached them, asking the juror if he was frightened, to which he replied yes, that something was said about lighting a segar, and that the constable then informed Mr. Deibert that the juror was not allowed to hold any conversation; that they then returned to the jury room; that he did not hear any conversation about this case, nor hear the name Britton mentioned, nor did he mention it himself on that occasion.

Mr. Cassidy, the constable who was with the juror on this occasion, says that he was close to him while standing in the alley, looking at the fire; that he did not hear the name of Britton used by the juror nor any other person present, nor did he hear any conversation about this case.

Mr. Deibert says that he is twenty-five years of age; was standing in the alley at the place described by the witness called to sustain this charge; that he saw the juror and consta-

ble when they came down the alley ; that he asked Mr. Calvert if he had got frightened, and Mr. Calvert replied that he had seen the fire from the window and became alarmed ; that the constable interposed and explained why Mr. Calvert could not hold any conversation ; that he heard nothing said relative to this trial by any one present.

Both of the constables were called and examined at length by the counsel for the defendant relative to the circumstances of each temporary separation by jurors in their custody. The manner in which they were lodged, boarded and kept while at the hotel, as well as their general deportment during the whole length of the trial. From which it appears that the officers were constantly with them, night and day, and never heard a remark in reference to the trial made in their hearing outside of the court room.

Seven of the jurors, all who were implicated in the specifications filed, were called by the commonwealth, who explained the causes which rendered it necessary in their judgment temporarily to separate at different times from their fellows. That on every occasion of such separation they were attended by one of the constables. That neither of them ever heard any remark or held any conversation in reference to this case outside of the jury box or their own room. That neither of them derived any opinion or impression whatever, as to the guilt or innocence of the prisoner, from anything which they heard or saw outside of the jury box.

The well known and irreproachable character of these gentlemen establishes this fact beyond controversy. That the prisoner was convicted upon the evidence alone ; unprejudiced and uninjured by any extraneous incident or circumstance attending the trial.

This is all an English Peer could demand ; and is awarded alike to all, without distinction, by our just and admirable system of legal equality.

It is due to the jury in this case to say that after a careful investigation of the facts disclosed by the evidence, the court is able to pronounce their complete and perfect vindication from every aspersion upon their conduct, charged or implied, in the reasons filed for a new trial.

In concluding our remarks upon this branch of the motion, we cordially adopt the language of Judge Rogers in delivering the opinion of the court in the case of the *Commonwealth v. Flanagan*.

“ Jurors have rights as well as defendants, and I am not the person to cast upon them undeserved reproach or unmerited censure. To yield to accusations against them lightly made, or without strong proof, would weaken, if not bring into con-

tempt that useful and indispensable institution in the administration of justice, in a State desirous of preserving the principles of liberty and good government."

The only remaining reason to be considered is the 5th. Because the verdict is against the evidence.

The jury are the constitutional judges of the weight and value of evidence, and more especially in the trial of capital cases, it is their province to determine from the evidence the guilt or innocence of the accused. The jurors in this case were selected, by free exercise of the right of challenge, with the avowed purpose of securing the services of the most intelligent, and unexceptionable jurors embraced in the panel. This end was successfully attained in the judgment of the court. A patient and deliberate hearing, at great sacrifice of comfort, was willingly given to the case. The defence was ably conducted, and earnestly and forcibly presented in three speeches to the jury. The jury retired to their room, and without consultation or interchange of views, as has been disclosed voluntarily in this evidence, they voted by ballot upon the guilt or innocence of the prisoner, which resulted in twelve ballots of guilty being cast. In like manner and with the same unanimity was the degree of the crime determined.

It would certainly require a strong case, and a clear conviction of duty, to justify a court in arresting judgment upon such a verdict.

We are constrained to say that this case possesses no such features, and that we are satisfied with the verdict.

The motion in arrest of judgment and for a new trial is therefore overruled.

Edmund P Middleton

Edmund P Middleton

Edmund P Middleton

Edmund P Middleton

Edmund P Middleton

I witness whereof I have hereunto set
my hand and seal this Twenty Sunday of August
Annodominis One thousand eight hundred and
sixty seven. (1867)

Middleton Will Case.
[Signatures to the Will.]

Edmund P Middleton

Court of Common Pleas, Philadelphia County.

OTTERSON et al. v. MIDDLETON.

Edward Penton Middleton, a wine merchant of Philadelphia, died upon the first of April, 1869. His will was admitted to probate by the register of wills of Philadelphia county, upon April 6th, 1869. No caveat against its admission to probate had been filed, nor had any proceedings to contest its validity, then been commenced.

The signature, "Edward P. Middleton," was written at the end of each of the six pages over which the will extended. [See *fac simile* of signatures upon the opposite page.]

Upon December 17th, 1870, a brother of the testator, George W. Middleton, filed an appeal from the register's decision admitting the will to probate, alleging as the grounds of his appeal, that the last signature of the testator, upon the sixth page of the will was a forgery, and that the name of the residuary legatee, Charles D. Middleton, had been written in the will after the decease of the testator. The residuum of the estate, amounted to between three and four hundred thousand dollars, so that the issue involved the greater portion of decedent's estate. The examiner appointed to take the testimony upon the appeal, was occupied with that duty at intervals from February 15th to December 17th, 1870, upon which latter date he filed his report. After hearing the arguments of counsel upon the question of granting a feigned issue to try by a jury the validity of the will, the Register's Court awarded such issue upon two points, viz.:

First. Is the signature of "Edward P. Middleton," at the end of the writing purporting to be signed by the decedent, a forgery?

Second. Was the said writing, before being admitted to probate, materially altered and mutilated fraudulently?

The trial which took place before Judge Ludlow in the Court of Common Pleas, commenced upon Tuesday, November 14th, 1871, and continued with the exception of Saturdays and Sundays, until Friday, December 15th, 1871, occupying the greater part of five weeks. Judge Ludlow charged the jury upon the latter date, going carefully and at great length over the whole of the evidence. The reading of his charge was concluded between 5 and 6 p. m., and the jury immediately retired. During the same evening they brought in a verdict, fully sustaining the will, upon both the points submitted, thereby establishing its complete validity. The case was conducted by the counsel upon both sides with eminent ability, and

exhibited a remarkable example of what unwearied exertions, patient attention to minute details, and thorough exposition of the multitude of facts involved, are able to accomplish in properly presenting a case of such great magnitude to the jury.

The counsel engaged were *George W. Biddle, Esq.*, and *Hon. William A. Porter*, for James Otterson, Esq., and *Hon. F. Carroll Brewster*, executors of the will.

And *George L. Crawford* and *William L. Hirst, Esqs.*, for contestants.

Charge to the jury by LUDLOW, J. Delivered December 15th, 1871.

This is a feigned issue, framed to test the validity of the will of Edward P. Middleton, deceased.

In any aspect we cannot overrate the gravity of this case.

To destroy a legally executed will, made by a sane man not improperly influenced, is a work of no common difficulty.

It is proper that it should be so, for the right to dispose of one's property is an incentive to honorable labor; seriously and causelessly to imperil that right, destroys confidence, shakes the titles of the living to property, real and personal, and overthrows that which ought to be held sacred,—the expressed wishes of the dead.

A will may not suit our ideas of propriety, we, individually, might not have distributed an estate as a particular testator may have done; that is, however, not the question at issue; all we desire to know is, was the testator, at the time of the execution of the will, sane, and was he uninfluenced in the legal sense of that term, and did he legally execute the document; if so, his will is a sacred thing, he has by law the right to do with his own as he pleases, even to the exclusion of those allied to him by the ties of affinity and blood, and his expressed wishes, legally made, must, and so far as the court is concerned, shall be sustained.

Just because of the sacred character of a last will and testament, to forge by imitation or otherwise, or materially to alter or mutilate a will, is to commit a crime of the most detestable nature.

The lips of the testator are sealed in death, and a fraud perpetrated upon him, violates every principle held manly, honorable, and sacred, by civilized men, while the living representatives of the deceased are cheated out of their inheritance. If such a crime has in any instance been perpetrated, every instinct commands us to drag it into the light of day, that its effect may be destroyed, and its guilty author or authors be held up to the indignant contempt of the living, to that just

punishment which by law is awarded to the proved perpetrator of the crime. A single voice from the grave at Blackwoodtown, N. J., would settle this controversy, but as a miracle cannot now be wrought, we must seek for the truth by an appeal to the law and the testimony.

Two questions are presented for your consideration.

1st. Is the last signature at the end of the last page, in the will of Edward P. Middleton a forgery?

2d. Has there been an alteration or mutilation of any essential part or portion of this will?

After weeks spent in this investigation, the jury doubtless understand perfectly the questions to be decided. We may, however, remark, that a verdict for the plaintiff establishes the will, while a verdict for the defendants, upon the question of the validity of the last signature, destroys the will altogether, and a verdict for defendants upon the second question presented, to wit: that of alteration or mutilation, will most seriously affect the interests of Charles D. Middleton, and indeed of all the parties to this suit.

Under our statute "Every will shall be in writing, and unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof, or by some person in his presence, and by his express direction, and in all cases, shall be proved by the oaths or affirmations of two or more competent witnesses, otherwise such will shall be of no effect."

The jury will observe that a will must be signed at the end thereof; for the purposes of this case it is enough to say, that the *final* signature is the one which gives validity to the will; it is well for greater caution and security, to sign each page, where the will is written on more than one sheet, at the end or bottom thereof, as is alleged was done in this case; but these signatures add nothing to the legal validity of the execution; it is, as we have remarked, the last signature which is pre-eminently the legal signature, and, therefore the execution of the will.

Attesting witnesses are also unnecessary in Pennsylvania, but the testator's signature must be proved by two witnesses, and this proof is *prima facie* evidence of the execution, although the body of the will be not in the handwriting of the testator.

Where we have a case in which there are subscribing witnesses, each witness must separately depose to all the facts necessary to a complete execution, and it is sufficient if the testator acknowledge the signature to the will to be his act and deed, though, as was decided in one case, the subscribing witness signed the will before the testator. So also if one of the two attesting witnesses, from defect of memory, is unable to state

what was said and done at the time of the execution of the instrument, but is able to swear that he subscribed as a witness, such evidence would be *prima facie* testimony of execution, "for the credit thus given to the attesting name rests upon the presumption of the honesty of the transaction until the contrary is made to appear." (*McKee et al. v. White*, 14 Wr. 860.)

In ordinary cases the presumption arising from proof by the attesting witnesses, enables the court, as matter of law, to permit the will to be submitted to a jury, and this has been done in this case.

Here, however, it is alleged a gross fraud has been perpetrated, and the plaintiffs after proof by the attesting witnesses proceeded to present their whole case to the jury, and thus assumed to prove the entire validity of the will. I objected to this course as being contrary to our usual practice, but the defendants expressly waived all objection, and the case in this way proceeded to a conclusion. Perhaps it is as well, for here we have an alleged fraud; this question of fact is one emphatically for the jury. Any legal presumption arising from the technical proof of execution, may of course be overthrown (as, by way of illustration, any witness may be proved to be perjured or contradicted in a material point), and it is but proper and legal, that those who seek to establish a will against not a charge of insanity, or of undue influence, but of gross fraud, should satisfy the jury that the document purporting to be a last will and testament is such in truth or in fact. (*Harden v. Hays*, 9 Barr, 164; *Harrison v. Rowan*, 3 W. C. C. 580.) Or in this case, to state the proposition accurately, the jury ought to be satisfied that the last signature is genuine, which answers the first issue before us, and supposing you so decide, you must be also satisfied, that in the words and sentences attacked as altered or mutilated, there has been no alteration or mutilation, and this answers the second issue. While this much is to be said, so far as the duty of the plaintiff is concerned, it ought also to be added, that the burden of proof, where fraud is alleged, is upon the party who alleges it, for fraud cannot be presumed, and where, as in this instance, a crime is charged, it ought to be established by those who allege it, by clear and indisputable evidence. It is not enough to prove suspicious circumstances, for mere suspicion is not proof.

An alteration or erasure in an immaterial point will not vitiate either a deed or a will, while the writing in of a name is not of itself an interlineation, and of course cannot be an erasure. In Pennsylvania it has been decided that interlineations and erasures made by the testator, and of which no mention is made at the time of execution, will be presumed to have been made prior to the act of execution. As there does not appear

to be an interlineation in the instrument before the court; and only the erasure of the word "friend," which as a word is distinctly visible, I cannot say a presumption arises against this document, because the word "friend" is erased, and "nephew, Charles D. Middleton" written in. While, however, these remarks are made, we do not intend to say that the plaintiffs are not bound to satisfy the jury as to the validity of the whole will, and each portion thereof, which has been and is the subject of attack.

This duty clearly devolves upon the plaintiffs under the issues here made.

In the form in which these issues have been framed, you may find both issues, or either, for or against the plaintiffs or defendants, as you may determine upon the evidence. That is to say, you may find the signature to the will to be genuine or forged, and as a distinct finding, you may say whether the will has or has not been mutilated or altered in the manner alleged.

These questions of fact you alone can decide. To aid you in this undoubtedly difficult, intricate and somewhat confused duty, because of the voluminous nature of the evidence, will be my special and earnest effort.

Before we proceed to discuss the disputed facts in this cause, it may be as well to consider those which are substantially admitted, or have been proved without contradiction.

Mr. Edward P. Middleton was, during the last portion of his life, a wine merchant, resident in this city; he was an unmarried man, had accumulated a large fortune,—in personal estate alone he owned considerably over \$400,000. Toward the close of March, 1869, he became sick, and on the 1st of April of that year he died, on the 5th of the same month his remains were deposited in a vault at the Woodlands, afterwards they were removed to Blackwoodtown, New Jersey, and were there buried, a monument being erected over them.

As he was unmarried, he died without legal issue, and at the date of his death he left surviving him three brothers, John C., William, and George W. Middleton, and three sisters, Mrs. Livermore, Mrs. Ware, and Mrs. Norcross. One brother, Charles, and one sister, Mrs. Scott, pre-deceased Mr. Middleton. Charles left three children, of whom Charles D. Middleton, the alleged residuary legatee and devisee, was one. Mrs. Scott, also at her death, left a large family of children.

These were the nearest living relatives of Mr. E. P. Middleton, and I may remark in passing, that had he died without a will, his estate would have been divided among them, by the intestate laws of Pennsylvania, the nephews and nieces, by comparatively recent legislation, taking the share of the deceased brother and sister respectively. It does not seem to be

seriously denied that to some of his relatives, Mr. E. P. Middleton had been very kind; he had for some time advanced some money in aid of his brother, John C., who was and is an invalid, and of his sister, Mrs. Ware, whose husband had been unfortunate, and who needed his brotherly care. It also appears that the alleged testator had advanced to the nephew, Charles, D. Middleton, who had formed a partnership with Mr. Locke, in the paper hanging business in August, 1868, sums of money, not, it is true, to a very large amount (about \$1,700), but enough to enable that firm to proceed in the ordinary course of their business; he had also written a letter giving them credit,—when death ended these transactions.

It appears that prior to the date of the will, Mr. Otterson had acted as the professional adviser of Mr. E. P. Middleton, in the matter of the preparation of a will—a draft was made, and after numerous delays a paper, *not executed*, and in blank, in so far as the name of the residuary legatee and devisee, the names of the executors and date were concerned, passed from the hands of Mr. Otterson into the possession of Mr. E. P. Middleton.

What became of this paper, and whether it is or is not the alleged will, now produced, is a question we will consider hereafter.

While Mr. E. P. Middleton was sick, indeed upon the 1st of April, 1869, the day he died, the vault of the Fidelity Trust and Safe Deposit Company was visited by Mr. Otterson and Mr. Fithian, in the presence of the president, Mr. Browne, the box examined, a paper envelope pointed at, the box locked and replaced in the safe or vault. On the next day, April 2d, 1869, the vault was again visited, the box taken out of the safe in the presence of Mr. Patterson, the envelope removed from the box and cut open, a paper taken out, again replaced in the envelope, which was then deposited in the box, and the box replaced again in the safe; Mr. Otterson, Mr. Fithian, and Mr. Geo. W. Middleton being then present.

For the third and last time the office of the Trust Company was again visited, on the day of April 5th, 1869, and before the funeral. At this time Messrs. Otterson and Brewster, the alleged executors, were present with Mr. Browne, the president of the company—at this time the box being again removed from the vault, the envelope was taken from the box, its contents examined, especially as to a portion thereof, by Judge Brewster, a paper was then handed to Mr. Otterson, who placed it in his coat pocket, then Judge Brewster walked from the office of the company, Chestnut below 4th street, north side, to the office of the register of wills of the county, which you know is in Chestnut street above 5th, south side. A paper was then deposited with the register.

The will now before the court was admitted to probate at an early hour of the next day, to wit: April 6th, A. D. 1869.

The alleged testamentary document, exclusive of the residuary clause, disposed of about \$100,000 worth of property, and in it each of the testators' heirs-at-law, are remembered, except his brothers, William and Geo. W. Middleton.

Mrs. Hannah Norcross, Mrs. Martha C. Ware, and Mr. John C. Middleton, each received the interest of \$10,000 for life, Mrs. Livermore \$20,000 in cash. The children of his deceased sister, Mrs. Scott, \$10,000, and the children of his deceased brother, Charles (among whom you will remember is the alleged residuary legatee and devisee, Charles D. Middleton), each the sum of \$3,000. Mrs. Bacon who is named in the will, died before it was executed. It does not appear from any evidence in this cause, that any human eye saw Edward P. Middleton write with his own hand either of the six signatures to this alleged will.

Having thus discussed the leading facts, which you may believe have either been admitted, or have without serious dispute been established, we proceed to notice the contested facts in this cause.

Before we pass to a consideration of the paper called the will, let us endeavor to trace the position and condition of the envelope which has been produced in court, and which it is contended, held this contested document. Of the witnesses produced and examined, Messrs. Fithian, Otterson, Brewster, N. B. Browne, and George W. Middleton saw an envelope at the office of the Fidelity Company.

Mr. Otterson saw it three times—Messrs. Fithian and N. B. Browne twice—Messrs. Brewster and George W. Middleton each once. Messrs. Fithian, Otterson, and Browne saw an envelope at the first visit made to the vault, and they both identify the envelope produced in court. Messrs. Fithian, Otterson and George W. Middleton saw an envelope taken out of the box, on the second visit. Messrs. Otterson and Fithian identify the envelope, while Mr. George W. Middleton cannot identify the envelope, but says it may or may not be the one. He says: "An envelope was taken out and opened." Judge Brewster, Mr. Otterson and Mr. Browne, on the third visit, again see and identify the envelope.

Mr. N. B. Browne is an undoubtedly important witness, and his testimony is as follows: "Mr. Otterson pressed the paper on one side, and then the other, and called my attention to what was written on it—I have no doubt that that is the envelope—I recollect the language written, endorsement of name, and I recognize the signature. The envelope so endorsed was not taken that day, not even removed from the box."

On the last visit the witness says. "The envelope was taken out—I think Judge Brewster seemed to be examining who the executors were, called my attention to the clause appointing executors. I glanced at it, saw they were named, and said there could be no objection to their taking the will. Saw nothing special to identify the paper, except the names of James Otterson and F. Carroll Brewster, the paper on that occasion contained their names."

This testimony is important and bears directly upon the existence of a paper, to wit: an envelope which at one time was sealed, and is alleged to have contained the very document now contested. Our thoughts must now be turned towards the alleged will. Our eyes must be intently riveted upon it, for all the testimony submitted can only be of importance, as it throws in a greater or less degree, light upon the questions of the identity of this paper, the validity of the testator's last signature, and of the portions alleged to have been altered or mutilated.

This document is written upon six half sheets or pages of manuscript. It purports to be signed at the end of each half sheet, and at the end of the will, by Edward P. Middleton. There are two subscribing witnesses, F. E. Fithian and Thomas McKibbin. It is dated August 22d, 1867. This date is alleged to be in the handwriting of Mr. E. P. Middleton, a fact said to be admitted and certainly not contested in this cause.

The law looks, and we naturally look with more than usual care, to the testimony of these witnesses. In ordinary cases, importance is attached to the testimony of these witnesses, and weight follows their declarations. In this instance their statements have been either directly or indirectly attacked, and their evidence must stand or fall by the view which, upon a review of the whole testimony, the jury may take of it. What, however, do they say?

Mr. T. McKibbin says, Mr. E. P. Middleton said, in a low tone of voice, "this is my will," and, pointing to the signature, said, "that is my signature," and, he said, "you know we alter things sometimes." After some conversation of a jocular kind he took the document, says the witness, away with him.

In answer to a question, the alleged will being produced in court, the witness declares: "I believe that paper to be the paper, otherwise I should not acknowledge the signature."

On cross-examination, this witness, among other things, declares. "I did not, that I know of, at first see anything but the attestation clause; I think he lifted the paper and pointed to his signature, otherwise I would not have signed it." The

witness said he recollected, when spoken to, saying, "I was indefinite, and then I said I think he lifted a leaf."

This witness, upon further cross-examination, declared that he never said to Geo. W. Middleton that he "did not see E. P. Middleton's name on the paper, and could not say it was on it when he subscribed."

He further remarks that he wrote his name on "our desk;" don't think he testified that the paper was folded; and that he noticed the signature with the same care he would take in looking at a fifty cent note.

He does not pretend to swear that the last signature is the identical signature Mr. E. P. Middleton pointed at, and this witness was the first to sign as an attesting witness, although his name appears last in order upon the alleged will.

Mr. George W. Middleton declares that McKibbin told him, in one of his interviews with this witness, that he thought he (McKibbin) had witnessed two or three wills: one he recollected distinctly witnessing * * "he said my brother did not sign the will in his presence, he said he could not recollect having seen a signature on it; believed he did not. He said, when my brother handed it to him, he handed it in a bundle folded up, and told him it was his will, and he witnessed it as such."

Francis E. Fithian is the other subscribing witness to this alleged will, and his name appears first in the order in which the names of the two witnesses appear in the will.

Fithian was examined and cross-examined at great length. He admits that he wrote into the blanks the words "Nephew, Charles D. Middleton," and the names of the executors, although it appeared upon cross-examination, that at the register's office, in the presence of Mr. Crawford and Mr. Geo. W. Middleton, he said twice, I think, that he did not know the handwriting in which the blanks referred to had been filled up until he looked more intently upon it, when he admitted it was his own writing, and excuses his inability to answer the questions by reason of length of time which had elapsed, and his surprise.

The jury will note this testimony carefully, and determine what weight they will give to it.

This witness in substance states that Mr. E. P. Middleton, on account of the recent death of Mrs. Bacon (a sister of Fithian), entered into some conversation as to the propriety of arranging one's business matters, and said "he had made up his mind to execute his will."

"He took," says this witness, "one sheet of paper, it might have been the whole; he handed it to me, and pointing to a word in the open space, said, erase the word 'friend,' and put in my nephew, Charles D. Middleton; then in the other open

space put as my executors, James Ottersson, Jr., and F. Carroll Brewster, which makes me think positively I erased it. I asked him if I should take an instrument and scratch it out or mark it over, and he said: 'Oh, no, mark it out with a pen, so that the word can be seen underneath, for I do not want any flaw that my family can pick at to try and break my will, for I know when some of them find out they are not left anything, particularly my brother George, they or he will do all in his power to break the will.' "

The witness then states that after the names had been filled in, Mr. E. P. Middleton went next door, "took the paper away a short time; when he returned, that signature, T. McKibbin, was upon it; he then asked me to put my name as a witness; he laid it on the end of my desk; I said, shall I write it below? he said, no, put it above them, and then turned it over on another sheet, the leaf over, and pointing to the signature, said, this is my signature."

I think it must be E. P. Middleton's signature; after the will was executed, Mr. Middleton took it home with him when he went home to dinner.

As throwing some light upon this most vital part of this case, this witness was asked on cross-examination, among a multitude of other questions, whether he had not told G. W. Middleton that he did not know who wrote the names in, to which he replied, "I think it quite likely;" he then says, "I didn't recollect saying I did not know who wrote the names in, and that I did not know E. P. Middleton's name was on it, as I had not seen his name on it, and only witnessed it."

Mr. Geo. W. Middleton, in his testimony, declares that Fithian told him when he witnessed the will, he saw none of the inside of it, because it was none of his business, he also told him he did not know who wrote the name of Charles D. Middleton in, and that to the "best of his knowledge he had not wrote anything in, and this was previous to the interview at the register's office. Mr. Middleton further says, though unable to fix the dates, that Fithian told him his object was (in his visit to the office) to see if the will was filled up and get the date; that Mr. E. P. Middleton wanted to read the will or have it read to him."

He denies that he ever told Joshua Scott, soon after the interview at the register's office, that he (the witness) wrote Penton's name in the will, at his direction. Mr. Scott swears, that about the 16th April, 1870, he had a conversation with Fithian about the will, and "he told me he wrote E. P. Middleton's last name on the paper by his consent, on the will," and on cross-examination Mr. Scott says, "Fithian did not speak of writing C. D. Middleton's name at the time." The witness

further testified as to the condition of his hearing. Mr. Fithian declares, that very likely he talked to Jonas Livermore, and told Livermore that E. P. Middleton asked Otterson to write in his name, and he declined. "I did not say to him (says witness) that at that time I wrote it in he asked me to do it."

Mr. Livermore says that Fithian told him that before Mr. Middleton went to the mountains he got out his will, and asked Mr. Otterson to fill in a blank that was in it, he said Otterson declined doing it, on the ground that he might be executor, and his handwriting would not be proper.

He then said "Mr. Middleton turned to me (Fithian), told me to fill it up with Charles Middleton's name, * * * he said he did it."

Fithian denies absolutely that he ever told Jos. P. Butterworth, about February, 1870, "that he did not know if the will was signed when he wrote in it."

Mr. Butterworth declares, he conversed about two years ago with Fithian about the will, when Fithian said, he inserted the name of Chas. D. Middleton, at the request of Mr. E. P. Middleton. I asked him (said Mr. Butterworth) if the will was signed when he filled in the blanks, and he said he did not know.

Fithian don't remember telling Mrs. Livermore that he made another will, and she asked what was in it, and that I (Fithian) dared not tell her what was in it.

Mrs. Livermore testifies, that the night her brother died: "He told me my brother had made another will. I asked him what was in it. He said he daren't tell; could not tell me then, not daren't tell." In cross-examination she adds—a will while sick—but not what was in it.

Mr. Fithian declares that he don't remember telling Mr. T. J. Martin, that he did not know anything about the last signature, or that he did not see it when he witnessed it, he might have told him that he did not see the signature to examine it.

Mr. Martin testifies, that Fithian said, "Mr. Middleton came in one morning and wanted him to witness the will, he signed his name, and Mr. Middleton's name was not there, but he had no doubt he had signed it." Then Mr. Martin qualifies his remark by stating his general impression of the conversation.

This witness, Fithian, was cross-examined at very great length, for more than two days, and you will recollect the questions propounded to him, as to the kind of ink used, and the nature of the seals affixed to the alleged last will, as well as his full answers and explanations made upon the witness stand.

In reviewing at this point the testimony of the subscribing witnesses and contradictions thereto, you must not fail to remember the severe cross-examinations of each witness, and their

vital consequences in this controversy; if the credibility of these witnesses has been sustained, much, yes, very much will have been done to sustain this instrument, provided you believe it to be the instrument they executed; while on the other hand, if their credibility has been seriously shaken or destroyed, the case will be stripped of one of its most important features, for if subscribing witnesses are not to be relied upon, where shall we as confidently search for that light which will enable us to discover the truth.

To support the genuineness of this document, the plaintiffs called a number of other witnesses, to prove that a will had been executed by Mr. E. P. Middleton, and that Charles D. Middleton was in fact the residuary legatee and devisee.

Mr. Otterson declares the subject of the will was referred to on two distinct occasions; the first was on the occasion of the accidental meeting between Mr. E. P. Middleton and himself, when Mr. Otterson says he asked him if he had executed his will. "He told me (says the witness) he had." "I asked again if he had signed each page, at the foot, he told me he had."

He next referred to the will on the Sunday before his death, he told me he wanted an alteration made, "in regard to the property at Blackwoodtown, N. J.," which by a codicil he desired to give to his sister, Mrs. Norcross.

This witness was subjected to a rigid cross-examination upon the points above referred to, as well as upon others which we shall hereafter notice; this testimony is submitted for your consideration.

Another and most important witness for plaintiffs, is produced in the person of H. G. Leisenring, who swears that Mr. E. P. Middleton told him at an interview in his store, "that he had changed his will, and instead of leaving the bulk of his fortune to Geo. W. Middleton, he had willed it to his lame nephew, Charles D. Middleton."

Your attention is in this connection called to a reference made to a former examination of this witness, when nothing was said as to the bulk of the fortune, but only to the amount given to George.

At this interview, the witness says, Mr. Middleton was considerably excited at Geo. W. Middleton's ingratitude and his unkindness, because he remarked all Geo. W. Middleton had, he Penn had given him.

This witness was cross-examined with great skill, and great severity.

He was asked to fix the date of this conversation, and he did so by saying that he had made an assignment in November of that year, and that he had gone in consequence also of the West Arch Street Church affairs.

Upon being further pressed, he fixed the time as in the fall or summer of 1867.

His attention being called to his former testimony before the examiner he remarked, that he did not know that he had testified that the first interview in regard to the Arch Street Church, was in the spring.

The witness had no doubt he had seen Mr. E. P. Middleton frequently, but did not remember seeing him specially in the years 1868 and 1869.

"I have no recollection of saying the conversation (says witness) took place in June," though in answer to an inquiry read from (p. 186 of evidence) the court understood the witness to say, the interview in regard to the West Arch Street Church took place in June.

Mr. Leisenring says he went to borrow money, but can't tell how much he loaned, or if any was loaned; thinks he offered a note but cannot tell name, amount or time; does not remember a reason given, or language used in regard to money, but remembers conversation in regard to the will, "because it was of such a nature as to leave a deep impression."

I have not referred to the entire testimony of this witness, but to its material parts, simply for the purpose of refreshing your recollections, and of saying, that it ought to be examined with the greatest care. Did this witness satisfy you as to his substantial accuracy in regard to time, place and circumstance, and was he simply confused as to conversations and dates, or does his cross-examination exhibit such a want of accuracy as to render his entire testimony unreliable. This question you and you alone must answer. I invite your attention, I point out the leading features of the examination, and the rest must of necessity devolve upon you.

Francis S. Bacon is the next witness produced in relation to the fact of the execution of a will.

He says that he boarded with the deceased, at 908 Walnut street; he heard him in the early spring of 1867 speak on the subject of his will; expressed himself that he had been preparing a will; "spoke of legacies to the Old Man's Home, and to individuals, the boy at the store, porter, two young ladies living at Germantown, Miss Butcher, Mrs. Ward, and others."

He spoke, says Mr. Bacon, of the ingratitude of his family; said that Mr. Otterson had prepared his will, and that he and Judge Brewster were to be executors.

Soon after the burial of the first wife of this witness, which took place on the 20th of August, 1867, he, the witness, says, "on the 22d day of August, 1867, Mr. Middleton came to our rooms in the afternoon; he told me he had been having his will executed, and that he had appointed Messrs. James Otterson

and F. Carroll Brewster his executors, saying at the same time, he knew they would carry out his wishes to the letter. He fixes this date by reference to the fact that on the next Saturday evening he (Mr. Middleton) left for Cresson, and the register of the hotel being produced, proved that the name of Mr. E. P. Middleton appears on that register, the day of his arrival being on Sunday morning.

Mr. Bacon declares that he was repeatedly at the vault of the Fidelity Trust Company with Mr. E. P. Middleton, when he took his securities out, and on one occasion he lifted out an envelope which, he said, contained his will; Mr. Middleton said, "Frank, look at it—that contains my will." I took it in my hand. He said, "it may some day be of great service." * * * "I did look at it; it looked like that paper; I saw his name written across just as it is here."

In relation to Charles D. Middleton, the witness remarks that Mr. Middleton, among other things, said he was the only man in the family who took care of himself. One particular occasion he advanced him money to go into the paper business; said he was a worthy young man; he lost his mother when a boy, and he had educated him and taken care of him, and he was going to provide well for him. He finally adds that he was with Mr. E. P. Middleton in the Fidelity office, in 1867, prior to the 1868 coupons coming due.

This witness, as may have been expected, was subjected to a very severe cross-examination. He fixes the date of the first conversation in the spring of 1867, just before he went out of town in May, or about the 1st of June. He fixes the second conversation at between the 20th of August and the next Saturday night. He denies that he had used independent means to fix dates, or that the register at Cresson had been looked to; admits that he had seen Mr. Fithian and Mr. Ottersen, and had been in intercourse with Mr. Ottersen.

He adds to the conversation at the Fidelity office, this remark of Mr. E. P. Middleton, that "he expected a high old time after his death."

He now fixes dates thus: "I think this was in 1867, previous to cutting off coupons of 1868, in December, 1868; it might have been in January, 1869."

The witness cannot fix the time when he first saw Charles D. Middleton; thinks it might have been in '64, '65, or '66, but was positive it was before 1867.

He did not know that Charles D. Middleton's mother was yet alive (though in his examination-in-chief he had said she was dead), but remarks it might have been his father—one of his parents.

In relation to Charles D. Middleton, he says, "I said the con-

versation took place in 1867; I knew he, Charles, was not in the paper hanging business in 1867; the dates I suppose I have got wrong."

Prior to 1869, Mr. Bacon declares he, E. P. Middleton, "would bring the box to our rooms to cut off the coupons, four or five times, perhaps from six months to six months; he cut off coupons in the evening."

By the testimony of Mr. N. B. Browne, after October, 1868, a record was kept in the office of the Fidelity Company, by which it appears that on numerous days Mr. E. P. Middleton examined his papers in person at the office of that company, and on one day only is there a record of the removal of the box, to wit: on the 4th day of January, 1869, thus, "took the box—took box away from the building." On the 5th of January, 1869, there is this record: "10 A. M., rebt. box."

In so far as this record proves anything, it is clear that from October, 1868, to the death of Mr. Middleton, April 1st, 1869, the box was removed but once, and that was on the 4th of January, 1869, and it was returned the next day.

The witness states that the box was brought home prior to 1869. The registry was only kept from October, 1868, and before that time we, of course, have no means of testing the accuracy of the witness.

I have at some length given to you the substance of Mr. Bacon's testimony, with the cross-examination.

As this evidence is important, I have drawn your attention to it, in order to refresh your recollections, and also to furnish the means by which you may weigh it. Does it stand the test of cross-examination, and is it on the whole fairly reliable, if it does so do, and, is thus reliable, it is most important. If it does not, and for any legitimate reason is not to be regarded, an important piece of testimony is stricken from this case.

To throw additional light upon the fact of the execution of a will, other witnesses have been examined. Mrs. Annie M. Bacon received from Mr. Middleton, the night before he was taken sick, a prayer book, on the clasp of this book is the date, "March 18, 1869." Mrs. Bacon thus fixes the time when Mr. Middleton talked to her about having his affairs all arranged, and his will made. "Spoke of Judge Otterson as having prepared it." Referred to several legacies; spoke of leaving \$20,000 to a sister; to another sister \$10,000; \$1,000 to Mrs. Howe; \$1,000 to the two Misses Butcher; \$1,000 to one of the men at the store, and \$10,000 to Mrs. Bacon (whom the jury will remember died in August, 1867, and whose death, according to the statement of this lady, and of Mr. Fithian, so preyed upon the mind of Mr. Middleton that he made his will).

On being recalled towards the close of the case, she said she

desired to add something to what she had already said, which she did in these words: "He said his nephew was well provided for in his will."

The jury cannot fail to remember the time and circumstances under which this testimony was given, and they must weigh well these circumstances when they consider this evidence. Some testimony was presented tending to prove what occurred after she left the court room. I refer to this circumstance and submit her evidence to you.

Mr. Jas. D. Whetham heard him many times speak about making his will. Spoke about it as made. "He came into my store, and told me he had made his will, and left two young men something handsome, Jos. Carson and William Owens."

Mr. Stephen B. Fotterall says that he and Mr. E. P. Middleton frequently rode out on horseback; spoke about the necessity of making a will, when Mr. Middleton told him "he had attended to these matters, and gave me to understand he had left something to charities. He spoke frequently about the will as though he had done it."

He fixes the date of these conversations as before the 20th of February, 1869 when he, the witness, went South.

At this point, we introduce to you, the testimony of Mr. Charles Matheys, a witness for defendant, and whose evidence bears not only upon the fact of the existence of a will, but also upon the nature of its contents. Mr. Matheys says, that on the day Mr. Middleton took sick, he had a conversation with him on Market street, between Front and Second, and between 11 and 12 o'clock A. M. "He told me, says Mr. Matheys, as near as my recollection serves me, he had made a will, and he thought I would think it very strange. I asked him why:" said he, "with few exceptions, I have given most of my property to public charitable institutions, and to a few friends. He told me I was one of his friends, and he took good care of me."

We have thus referred to the testimony of nearly all, if not every one of the witnesses who speak in corroboration of the fact of a will having been made—we say of a will, without referring to this identical paper now produced in court as the document.

You will doubtless observe, that a number of these witnesses speak generally of a will, others refer to the contents thereof, and one or more to the fact of Charles D. Middleton being an object of the testator's bounty. It will be important now, to note the state of the evidence in relation to the exact position of Charles in the family.

There is a conflict of testimony upon this point, for while the

plaintiffs have produced many witnesses who speak of the interest which Mr. Middleton had taken in Charles, and some already referred to, who say that he had or would do much for him. In addition to those already named, I may add Mr. Holmes, Dr. B. F. Palmer, who manufactured the artificial foot, and whose testimony was further explained by Geo. W. Middleton in his evidence where he gives his version of his brother's interest in Charles, and produces a letter written by Mr. E. P. Middleton at Cresson, wherein he speaks of the necessity of making Charles D. Middleton take care of himself.

Mr. Locke, his partner in business, and Mr. Sandt, who declares Mr. Middleton told him "he had put him in the paper business, he was doing right well, and after his death he would set him all right." The defendants have produced witnesses who trace the history of this young man from his earliest infancy, and thus endeavor to prove that while the Brothers Middleton, did, at a certain period of the life of Charles, employ him in his store, and afterwards to a limited extent, assist him, yet he was, in his early years, taken care of, and supported by several of his relatives, including Geo. W. Middleton. Mrs. Ware declares that Mr. E. P. Middleton not only did not take a special interest in Charles, but on various occasions expressed to her a want of confidence in him, because he was addicted to pleasure instead of business. Did not visit his infant child, born on January 7th, 1868, though, Mrs. Caroline A. Howe is called by plaintiffs to prove that at a Thanksgiving dinner, Mr. E. P. Middleton in answer to an inquiry as to whether he had been to see Mrs. Charles D. Middleton, and to some remark about her having a very pretty child, replied that he had not, regretting that he had not done so, and intended to visit, but had been extremely busy, and was interrupted.

Mr. Geo. W. Middleton gives you his statement of the position of Charles in the store, with the family, and with his uncle, Edward P. Middleton; Charles D. Middleton, is himself examined at great length, in relation to his early life, his business occupation to the time of his uncle's death, his habitual home or homes, until he married, and his declarations in regard to this will.

The defendants have endeavored substantially to contradict his narrative, by a number of witnesses, who are generally members of the family; especially as to the terms upon which he lived with his uncle, or rather, I should say, with regard to the feelings and acts of his uncle towards him, and as to a conversation, in which at John C. Middleton's house, in the company of his brother-in-law, Mr. Ludy, Charles D. is said by the members of the family then present, to have asked his uncle, after speaking of his alleged forgery of the will, if he should

run away, to which Mr. John C. Middleton replied, "Not if he hadn't murdered anybody," and which, Mr. Ludy and Charles D. absolutely deny.

I refer to this testimony not to comment on it at length, but to bring it before your minds as bearing upon the probability of Mr. E. P. Middleton selecting Charles D. Middleton as his residuary legatee. It has a bearing upon the subject; you can weigh it, and determine what the real relation of Charles D. Middleton had been during his life, and was at or about the time of his death.

Having thus disposed of the evidence directly affecting the execution of a will, and the relation of Charles D. Middleton to the testator, let us now endeavor to see how this particular instrument is identified.

In addition to the testimony of Messrs. Fithian and McKibbin, we have the evidence of Mr. Otterson, who declares that this identical paper is the paper prepared by him.

It passed, says Mr. Otterson, in blank to Mr. E. P. Middleton: Fithian and McKibbin testify, as already mentioned, to the execution of a paper; then Mr. Fithian says, Mr. Middleton took it away with him when he went to dine, and I think we heard no more of the paper, until an envelope purporting to contain a last will and testament, is seen by Mr. Beacon, when at the vault in the Fidelity Trust Company's building. Mr. Middleton took an envelope in his hand and said, "Frank look at it, that contains my will."

The date of that conversation is not precisely fixed, but the witness said, "I think this was in 1867, previous to cutting off coupons of 1868, in December, 1868, it might have been January 7th, 1869."

After that time, nothing appears to have been seen of the envelope or will, or both, until April 1st, 1869, when Messrs. Fithian and Otterson visited the vault, and, as you will remember, the testator not being then dead, Mr. Browne refused to permit anybody to take the envelope out of the box, and it remained unopened in the box.

The next morning Messrs. Otterson, George W. Middleton, and I think Mr. Fithian, visited the vaults of the Trust Company, when the envelope was cut open in the presence of these gentlemen, and an officer or officers of the company, and the will was then for the first time taken out by Mr. Otterson, who held it in his hand, examined it to see if there was any directions for the burial, "then ran his eyes down one paragraph after another, to see if George W. Middleton's name was in the will; then looked to see how the blanks had been filled in, for residuary legatee and executors; then closed it up again, replaced it in the envelope, returned the envelope to its place,"

and the box to its compartment in the vault. This envelope is not again seen until the morning of the 5th of April, 1869, when Mr. Otterson and Judge Brewster visited the vault of the company, the box is again produced : "we took the envelope and its contents from the box."

Mr. Otterson is not able to say, that on the morning after the death, he saw the last signature to the will, but has no doubt that he did ; from what he saw, he says the impression upon his mind was, that it was an executed instrument.

Judge Brewster says, that he saw the whole of the last page, and the whole of the will ; "the document was turned over in this wise ; I saw a number of sheets and bequests," and he further remarks, that "the will proper, is in the exact condition I then saw it."

This paper, in an envelope, was handed by Judge Brewster to Mr. Otterson, who placed it in his coat pocket, and the two gentlemen then walked to the register's office, where Mr. Otterson handed the envelope and its contents to the deputy register.

In his cross-examination, Judge Brewster says, I distinctly recollect seeing my own name and nobody else's, and adds, I distinctly saw Mr. Otterson's, and I distinctly recollect seeing a number of the signatures of the testator.

Upon a portion of the testimony taken before the examiner being read to Judge Brewster, he says that "he don't remember saying in these words, that the signature was a strange looking one." As he remembers the substance of the testimony, it was "that the signature differed somewhat from the preceding signatures, and that this was to be accounted for by the natural hesitation of a man when executing such a document and by his miscalculation of the space, owing to his writing his first name at length, and to the fact that there was a seal on that line."

Mr. N. B. Browne says, and I copy his language on this material point from my own notes of evidence :

"The envelope was taken out, the will opened ; I think it was Judge Brewster who seemed to be examining who the executors were, called my attention to the clause appointing executors ; I glanced at it, saw they were named, and said there could be no objection to their taking the will."

The will being produced, he said, "I see the clause beginning 'lastly ;' I see nothing special to identify the paper, except the names of James Otterson and F. C. Brewster ; the paper on that occasion contained their names."

The defence called Mr. H. S. Tarr in order to throw further light on this point of the case, and he related to you the occur-

following day for a few minutes; he called again between five and six o'clock, but the subject of the will was not again referred to. He called again about nine p. m., and has no recollection of seeing him again until the day of his death, when he saw him alive for the last time. Mr. Middleton was in a sinking condition, and Mr. Otterson said, that in answer to some remark as to what he came for, Mr. Middleton extended his right hand or arm across his chest, saying: "Oh, no, no, it is all right; we have known each other a good many years, or a great while; I fixed it so because I preferred you to anybody else."

The nurse, Tacy S. White, declares that Mr. Otterson was at the house after Tuesday (the day the nurse came). He called on Wednesday, did not see the sick man, then called in the evening; Dr. Huston and Mr. De Wæle were there, he (Mr. Middleton) was in a dying condition, and no conversation took place then.

The next day, about one o'clock, she says she saw Mr. Otterson in the room, when he asked Mr. Middleton if he was ready to attend to that business down Jersey, when Mr. Middleton replied, "his thoughts were all turned in another direction." The alleged testator, says this witness, had referred to Mr. Otterson several times, and asked why he did not come.

On cross-examination, the witness stated that Mr. Middleton spoke twenty-four hours after she had, in her examination in chief, declared he was in a dying condition, and she adds he was rational to the last. Miss Phillips says he was not, in her opinion, in a dying condition until Thursday. Mr. Fithian corroborates Mr. Otterson as to his statement in relation to the codicil.

It seems to be established (though that, as well as every other fact in the cause, you must settle) that no member of his family, except Mrs. Livermore, nor any intimate friend saw Mr. Middleton at his last sickness. I believe Charles D. Middleton did not see him, and Mr. Fithian declares that Mr. E. P. Middleton directed him to write a letter, saying that he, Mr. Middleton, did not desire to see his relatives. Miss Phillips says that Mr. Middleton "did not allow any one to see him; he said when he got better he would see all. Mrs. Thorn was admitted, supposing it to be Mrs. Norcross."

There is some doubt as to who obtained and produced the keys to the vault at the office of the Fidelity and Trust Company. Mr. Otterson says Mr. Middleton told him they were in a private drawer in his safe at his counting room, and that a messenger was dispatched for them as soon as he learned Mr. Middleton was so very ill, and when afterwards he prepared a codicil without regard to the date of the will, which paper,

that is the will itself, he had been, on his first visit to the company's office, unable to see.

Mr. Fithian does not know whether he or Mr. Otterson produced them. He does not know how or where he got them, "unless Mr. Otterson and myself (says he) got the keys from Mr. De Wæle at the house." Certain, however, it is, that the keys were produced at the office of the Trust Company, at the first visit, and Mr. Browne, the president of the company, declares that the keys are given up to the holders of boxes, and not kept or retained by the company, or its officers or agents, and furthermore, that no person but the holder of the vault or safe is at any time permitted to open a safe, unless in writing he gives that power to a special deputy, which it appears was never done by Mr. E. P. Middleton.

Coupled with these facts, let us examine the testimony in regard to the reading of the will.

It cannot be denied as a fact that a copy of a will, or a paper purporting to be such, was produced and read at a meeting of the family, held at Mr. Otterson's office on the morning after the funeral, to wit, April 6th, 1869, before any testamentary document was proved; it further appears that the original will was not produced. Some little conflict arises as to whether Mr. Otterson said, as he states, that he would send for it, or had it arranged to bring to his office if it was wanted, or whether, as Mr. George W. Middleton testifies, he, Otterson, said the will is at the register's, and any one wishing to see it can go and look at it.

All the testimony agrees in this, that the family and the executors assembled; that George W. Middleton made a proposition to divide the estate equally; that John C. Middleton objected, and that William said he would go with his brother George in contesting the will. Susan, the sister of Mr. Middleton, asked if there was not another will, says William, and Mr. Otterson answered no.

Conflict of testimony also exists as to the time when Charles D. Middleton came into the room. Several witnesses on the side of the plaintiffs declare he came in after the family had assembled, others say, especially John C. Middleton, that he was in the office before the family arrived, and that he went out and came back again.

Charles D. Middleton states that he did not know the contents of the will, and was taken by surprise when he heard he was the residuary legatee and devisee, and that he had only been requested by Mr. Otterson that morning to be present at the reading of the paper. John C. Middleton relates a conversation he had with Charles, from which he supposes a knowledge by Charles of the contents, before the will was read.

During the reading of the alleged will a circumstance is said to have occurred which has elicited extended comment, and requires special notice.

It is said by the defendants, that the porter of Mr. Fithian appeared and handed a paper to Mr. Otterson, which he immediately placed between the leaves of a book. Mr. Otterson denies this altogether. He does not recollect seeing the porter, and sums up his denial in these words: "I am certain now that while the family were together, no paper of any kind was handed to me which had any reference to any of the Middleton family."

Judge Brewster thus testifies: "During the reading of the will, I think some gentleman did enter, he handed Mr. Otterson something, but that was happening so frequently, I could not pretend to recollect. I have a misty recollection, but I don't remember the paper. I should say the person was white. If I saw him, I don't know I should remember him. (Mr. Holmes, the student, being called.) The witness says, "I recollect the person as a gentleman in the office, he is not the person I refer to."

Mr. John C. Middleton begins his testimony, in that part of it which relates to or has any bearing on this subject, by saying that on the morning the will was read he went to his brother's store, before going to Mr. Otterson's; and Mr. Fithian said to him, as he took a paper out of the fire proof, "There is a paper concerning you which has to go up; he said something about he would send it; he did not give me the paper." Then the witness in another portion of his testimony says, "The porter from the store came in just after he commenced reading copy, and handed him, Mr. Otterson, a paper; a bunch of paper; it appeared to be a pretty large package; in an envelope, about the size of that envelope; he raised it just that way, and put it between the leaves of a book." Again he says: "As he got up he took that paper out of the book and put it in his inside coat pocket." And again the witness says: "I asked Mr. Otterson if that paper concerned me; he started out in very much of a hurry, and said that paper will be attended to at another time."

Mr. Fithian declares that he does not remember telling Mr. John C. Middleton that he had a paper concerning him that had to go up, and Mr. John C. Middleton says, "That when he called Mr. Fithian's attention to it, he (Fithian) said he did not recollect it."

Mr. Wm. Middleton confirms the statement made by his brother, John C., in relation to the visit of the porter, and the production or delivery by him of a paper to Mr. Otterson, which was placed between the leaves of a book. Mr. Geo. W. Mid-

dleton remembers an interruption by some one coming in the room and delivering a package of some description, after Mr. Otterson began to read, but did not notice the person. While Mrs. Livermore says, Fithian told her on the morning the will was read, that he had an envelope to send up by a man or boy, she forgets which. She further testifies, that the porter came into Mr. Otterson's office, and handed him an envelope, large size, which he put in a book; she then describes this paper, and says he (Mr. Otterson) turned a little red; he colored as he took the paper. The plaintiffs call the porter, Michael Marley, who declares that he took no paper up from Mr. Fithian to Mr. Otterson's that morning.

In this connection I call your attention to a receipt which Mr. Fithian produced (No. 200), and by which he endeavors to explain the circumstance which may have given rise to this particular charge; he has some doubt as to the person from whom he received it, and I think at last he declares it was not Mr. Otterson. The defendants on the other hand endeavor to contradict his statement by the testimony of John C. Middleton. In relation to the identification of the copy used on the morning the will was read, there is some conflict of testimony. Mr. Otterson declares he sent Mr. Holmes for it on the morning the will was read, and Mr. Holmes testifies he received it at the register's, and brought it directly to Mr. Otterson's office.

You remember Mr. Otterson, in his testimony states, that when he and Judge Brewster arrived at the office of the register, some conversation took place with the deputy register as to the propriety of depositing the envelope in the office, when at last it was marked with the initials.

A copy was *then* ordered, and every effort made to obtain it at the earliest moment.

The clerk, Mr. Reed, identifies this copy as one made on the day it bears date, to wit, the 6th, and not the 5th of April. He made two copies, and this was the first.

Messrs. John C., William and Geo. W. Middleton each say the copy read from was one on white paper, and not like the one, No. 50, now in court, and that it was tied up either in the middle or at one end.

Mr. Chas. D. Middleton was requested by Mr. Otterson to make a copy of the will from the one in Mr. Otterson's possession, as I understand his testimony he took that copy to his store and had it in his possession until about 4 o'clock in the afternoon, when he returned it, but as he omitted a portion it was destroyed. Mr. Thorne was called to prove that Charles on that day was in West Philadelphia; while the plaintiffs produced John Robertson, who was at Mrs. Thorne's, and who remarked he don't think it was the day the will was read,

because he knew its contents. And there we are left at this point of the case with the original copy held by Mr. Otterson, and from which the printed copies of the will have been made.

This point in this case is important, as it bears upon the identity of the will, now the subject of contestation; if Mr. Otterson read from a copy of a will then in the register's office, which copy had been made by the clerk, it is one thing; if he did not, then the question arises how and when did he obtain it. You must look at all the evidence touching this point, including that of Mr. Reed, and the marks and figures upon the envelope, bearing in mind that Messrs. Otterson and Fithian and Judge Brewster all declare that after the funeral they went elsewhere than to the register's office. If you find the copy read to be a copy made of the will then in the office, it bears directly upon the main fact sought to be established, to wit, the identity of this paper; if, however, you find otherwise, a very important fact will have been in that event established to sustain a theory which looks to the substitution of a paper, for the original will. In solving such a question, too much care cannot be exercised by you, and I again call your attention to the evidence of the identity of this alleged will, already referred to, up to the time of its deposit in the office of the register of wills, including the testimony of Mr. McKibbin, for if you are satisfied that that paper was an executed will, without blanks, and that the copy read by Mr. Otterson is an identical, word for word, copy of that instrument deposited with the deputy on the morning of the 5th of April, you will go very far to settle the truth of the case as to this fact. Just here I may as well refer to the evidence in relation to the existence of the original draft of this will.

Mr. Otterson does not deny that on the evening of E. P. Middleton's death he said that he had no recollection of having a copy of the will, and it remained in his fire proof for months, and was not produced until it appeared at the examiner's office. He said to Mr. Geo. W. Middleton, "he had not a copy of the will, and that time (he adds) he did not recall the circumstance of my having notes of original instructions." Mr. Geo. W. Middleton declares that Otterson told him that he had drawn a will, that it laid in his office two years before his brother took it away. Said that he had no sketch or memorandum to refer to for information, and that he had been to Fidelity and Trust Company that day to get the will to look at it, and see if the blanks were filled up, to get the date, as (Mr. E. P. Middleton) wished to make some alterations. Mr. Otterson in his examination denies this, while he admits, as I have before said, that he had forgotten the existence of the original draft. I refer to

this branch of the evidence as it may have a bearing upon the question of the copy read, as well as upon other parts of this case.

I have said nothing up to this time about certain general facts in this case, to which I shall refer before proceeding to call your attention to the evidence submitted upon the subject of the handwriting of deceased.

A number of witnesses have been called to prove the exact position of Charles D. Middleton toward the alleged testator, and so a number have been examined to show the position of his brothers, William and George W.

George W. admits that he had difficulty with his brother, the cause being some family trouble in consequence of which a dissolution of partnership took place February, 1864, a considerable time before E. P. Middleton died. In fact at the time of his death an unfriendly feeling evidently existed. A number of witnesses have been called, several to prove that Mr. E. P. Middleton not only had difficulties with his brother, but that he (George) had threatened him with personal violence, in consequence whereof E. P. Middleton had declared he would cut him off. The defence endeavored to prove the non-existence of this state of things, at least to the extent contended for by the plaintiff, calling among others a witness to show that he had sent a customer to George, after he had established an independent place of business, and by another that he spoke friendly.

Wm. Middleton admits he was only on speaking terms, while a witness for plaintiff says the testator told him "Bill, that I set up in business, has done everything but what I want him to do."

To John C. Middleton a number of questions were propounded, the indirect object of which was to prove the interest the testator took in him, while on the other hand his position in reference to the testator, and to property which he rented from George, and the alleged arrearage of rent, was freely examined into to rebut the presumptions arising; and to show how it came that he appeared in this suit, acting with the defendants. You must well remember the evidence for and against the theory of John C. Middleton's interest for or against the validity of the last signature, and against Charles D. Middleton.

This evidence undoubtedly bears upon the reliability of his testimony, and may be weighed by you with reference to that testimony.

Another important matter has been submitted you, to wit: that portion of the evidence which tends to prove the fact that not long before his death, Mr. E. P. Middleton had entered

into negotiations, or made inquiries concerning certain property in New Jersey, the object being as stated by counsel to settle upon John C. Middleton a certain amount of property, in order to make him comfortable, and which sum it is contended is fixed at a much larger sum than that indicated by the letter produced by counsel for plaintiff, in which a sum of \$5,000 is spoken of. In this connection I call your attention to the testimony of Jas. M. Cassedy, who says that Mr. E. P. Middleton told him: "What he had to give to her (Mrs. Ware) he would give her direct and not to trustees." She had received from \$50 to \$100 per month.

I again refer to that portion of the testimony which tends to prove what Mr. E. P. Middleton in his lifetime had done, especially for Mrs. Ware and Mr. John C. Middleton, and to the testimony of Mr. Geo. W. Middleton, wherein he says and repeats in cross-examination that Fithian told him, "it must have been the night before he died," that John had been neglected about an investment.

As contrasted with this evidence, I again remind you of the testimony in relation to the position of Chas. D. Middleton with the deceased, and also the actual contents of the paper alleged to be a will now before the court, wherein to the amounts therein specified, every branch of the family receive a legacy to a greater or less amount, except Geo. W. and William Middleton.

Weigh all this testimony, as it bears not only upon the fact of the execution of this will, but also upon the probabilities of and the actual disposition of the estate.

There are other matters in this case which it is unnecessary for me to notice in detail, such as minor conflicts of evidence, testimony in relation to the motives of Fithian, in which something is said as to his purchase of the store, the price paid for it, and the remark which one of the executors is said to have made about "having a fat thing of it." I refer to these matters simply to complete the general reference to the testimony.

In looking lastly, for a few moments, at the evidence submitted upon the subject of the handwriting of the testator, I remark, that as against direct proof of the execution of an instrument, the most eminent jurists have asserted that "opinions with regard to handwritings are the weakest and least reliable of all evidence," nevertheless they have their weight. In Pennsylvania, handwriting may be the subject of judicial inquiry in at least three ways; the jury may be enlightened by the testimony of experts, by the evidence of those familiar with the handwriting of the person whose contested signature and writings may be under investigation, and the jury may draw their

own conclusions by a comparison of the disputed signature and writing with a test paper admitted or proved to be genuine.

In this case we have produced witnesses who are experts, and others who were in one way or another familiar with Mr. E. P. Middleton's signature. In addition to all this, we have offered in evidence a multitude of signatures, admitted to be genuine; these are to be found upon checks, upon notes in the shape of endorsements, on the back of a pass book, and in the letter books of the deceased.

I shall not now weary you by a recapitulation of this testimony, but will call your attention to the fact that the witnesses upon both sides were numerous, and that while for the defendants they testified against, or questioned the validity of the last signature, some of them doubted the validity of the signature upon the envelope; and one, I think, the validity of the first five signatures which are admitted to be given to the will, though upon being recalled, the witness explained his first answer before the examiner, and endeavored to harmonize it with the final views expressed by him in court. For the plaintiffs a number of witnesses have testified to the genuineness of these signatures. Two were attacked by the defendant as having on one occasion denied a knowledge of Mr. Middleton's handwriting. You can perhaps form an intelligent opinion, by a careful comparison of the signature and writings in dispute, with the signatures submitted to you as tests; you must with all this evidence before you, judge whether there is such evidence of forgery, or mutilation, or alteration of the contested parts of this will, as either of itself, or in connection with clearly established facts, will entirely destroy the testimony of its execution in the signature and parts attached.

I call your attention at this point, to the evidence of Dr. Richardson, who tested the nature of the ink used upon a number of words or names, with his microscope, and whose general conclusion was, that two kinds of ink had been used, one of a brownish color, and the other of a black dye. In cross-examination he was thoroughly tested as the method of his examination, and was asked as to a number of matters, which all tended very fairly to develop the truth, and the reliability of his evidence. The signatures, words and documents tested by him are before you, and in this connection I invite your attention to the evidence of Fithian, in relation to the ink used by him.

You must remember that he was speaking of a transaction which took place in 1867; he described what kinds of inks he used, and how he used them; the position of the ink stand, of himself, and of Mr. E. P. Middleton in the room. You can and

ought to weigh this testimony with a view to the circumstances which surrounded both of the actors in this transaction.

You have heard the learned arguments of counsels upon both sides of this cause upon all the evidence on this point, and I submit this testimony to you with the remark, that as an item of evidence, it may throw light upon the main facts contested here.

Having discussed the most material parts of the evidence in this case, we in conclusion will call your attention to some general thoughts applicable to this cause, and then submit it to you.

The great central fact to be established, is the genuineness of the last signature, and the want of any material alteration or mutilation of the document. In examining the testimony of the several witnesses produced, simple justice to them requires that you should weigh the testimony of each, keeping in view the circumstances surrounding each, the periods of time of which they speak, the motives, properly inferred from the evidence, which influenced each, and their general conduct and manner while upon the witness stand. Exact details of conversation cannot reasonably be expected when witnesses are speaking of remote periods of time, and confusion of dates may frequently occur without necessarily involving charges of deliberate perjury. The jury must look rather to the substantial substance of testimony than to precise details, for we all know that a cause supported by evidence which is substantially true with circumstantial variety is apt to be a just cause.

Where, however, a witness insists upon a particular and important statement, that statement ought to bear the test of the severest examination.

If, in weighing the evidence, you discover that any witness has, in a material point, stated that which inherently or from other testimony in the cause you believe to be false, his entire evidence is contaminated, and the maxim of the law applies, which declares, that he who, as to one material point, speaks falsely, shall be altogether unworthy of belief.

Mere suspicion of fraud leads to investigation, but suspicion must not be mistaken for proof.

The human mind is so constituted that a jury ought to guard themselves upon this point, for it has been said, and is true, that nine men out of ten will, without proof, jump at a conclusion of guilt because of a suspicion.

Bearing in mind these general principles, turn to the testimony of the subscribing witnesses to this instrument; they are supposed to be the nearest the testator. When he actually affixes his name to such a document as this purports to be, they ought, at least, to know their own signatures, and they may, or

may not, be able to state many facts which occurred at the time of execution.

In this instance, these witnesses do undertake to testify to that which did take place, and one of them, Mr. Fithian, goes much further, and gives you not only an account of the circumstances occurring at the time he wrote his name, but also, as to the very words and letters filled into two at least of the blanks.

While, therefore, this testimony is, as we have said, most important, so it may be attacked and overthrown. We advise you to test, in the severest method, all the evidence which bears upon the credibility of these witnesses, do it fairly, and then give to that testimony whatever weight it deserves.

As to the validity of the last signature, we invite your special attention to the evidence by which it is sustained and attacked. Many witnesses have been examined upon this point; you have been aided by the evidence of experts, and of persons familiar with the handwriting of Mr. E. P. Middleton. Weigh well this conflicting mass of evidence, keeping in mind the testimony which bears upon the credibility of that of the subscribing witnesses.

As bearing upon the central point in the case, remember that which has been narrated concerning the position, condition, and circumstances of all the members of this family, including Charles D. Middleton, the residuary legatee and devisee. Do not forget, in this connection, that evidence which I have heretofore referred to, in support of or against the fact of execution, including the expressions of Mr. E. P. Middleton as to his having executed a will and its contents.

Remember, we are searching for the truth, as it affects this paper. We have no right to make a will for Mr. Middleton, but only to determine whether, in truth and in fact, he disposed of his property as is specified in the document before us.

If a crime has been committed it is not likely that direct evidence of it would exist; you must, therefore, look to what is called circumstantial testimony to aid you in ascertaining the truth of such a serious charge, for human experience teaches us that a body of facts may exist which can be so interlinked, and thus be welded together, as to point with unerring certainty to the main fact sought to be established. You ought to be reasonably certain that each fact in the chain of testimony is established by competent evidence, is consistent with every other fact established, and maintains a theory which, as a whole, will admit of no reasonable inference except that of guilt. Tested by these rules, circumstantial evidence is as reliable as direct testimony.

In this connection look closely at the persons surrounding

Mr. E. P. Middleton in his store at the time, and after the will is said to have been executed; and at his residence during his last illness. Examine all that is said to have been done there and then,

With all the light thus thrown on your deliberations, fix your eyes with an intent, a penetrating glance, upon this paper, said to be his last will; follow it closely, if you can, from its passage into Mr. Middleton's hands as an unexecuted document, containing blanks, until, by the testimony you see it again.

Trace its history into the safe and vaults of the Fidelity and Trust Company, tax your recollection as to the persons in whose presence the envelope and its contents were three times produced at the office of the company, and what they say concerning its identity. Mark each step in its final passage to the office of the register of wills, its production, deposit, proof, and subsequent whereabouts and appearance there and elsewhere.

Look to the circumstances attending the reading of the alleged copy to the family, on the day after the funeral, together with the testimony for and against the truth of the fact alleged by defendants, of the appearance of the porter with a paper at the office of Mr. Otterson, and which paper, it is alleged, was delivered to him, which fact is stoutly denied.

While examining into these most important parts of this case, a multitude of facts proved here will necessarily cluster around your investigation, and you will thus, I trust, be best able to determine the issues here presented.

I remark again, this is a very grave case, a fortune is to be distributed, but no amount of money can, for a moment, equal the value of character which, disguise it as we may, is nevertheless an important issue in this cause.

Consider the case justly, impartially, and for this purpose discard everything but the law and the testimony, thus shall you be able to arrive at a conclusion, founded upon the eternal principles of justice, upon these two questions:

First. Is the signature, Edward P. Middleton, at the end of the writing, purporting to be signed by the decedent, a forgery?

Second. Was the said writing, before being admitted to probate, materially altered and mutilated fraudulently?

[Legal Gazette, Dec. 24, 1871, Vol. 3, p. 411.]

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The act of Assembly of June 10th, 1871, relating to Pennsylvania executors and administrators accounting for foreign assets is unconstitutional and void. *I. B. Parker's Estate*, 331.

An expository law is destitute of retroactive force, because it is an act of judicial power and in contravention of the constitution of Pennsylvania. *Ibid.*

The act of Assembly incorporating the City Sewerage Utilization Company, is not contrary to the clause of the State Constitution, which directs that the Legislature shall pass no bill containing more than one subject. *Sewerage Co. v. Board of Health*, 402.

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An act of Assembly compelling executors and administrators to account for foreign assets, is unconstitutional and void. *Ibid.* 331.

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Goods concealed on board a ship by the steward, without the master's knowledge, while liable to be condemned and forfeited as being smuggled, are not to be treated as any part of the cargo subject to forfeiture, because not included in the ship's manifest. *United States v. The Stadacona*, 282.

The incautious navigation of a moving vessel in a place that required cautious movement, is negligence. *The Scottish Bride v. The Anthony Kelly*, 289.

Where a collision occurred, a defect in the light of the vessel at anchor was not sufficient to make the vessel pay her proportion of the damages, where the defect did not co-operate in causing the collision. *Ibid.*

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After a judgment entered by an alderman for \$14.43, and the payment to him of said amount and costs, he cannot afterwards open the judgment and rehear the cause upon the ground that there was a clerical error in entering it. *Nypps v. Kirk*, 387.

In proceedings for the collection of money, aldermen derive their whole authority from acts of Assembly; whatever is not therein contained for them to do, they are prohibited from doing. *Ibid.*

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ATTACHMENT EXECUTION.

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The words *other money capital* mean the money of individuals segregated and not aggregated. *Ibid.*

The act of Assembly of 23d December, 1869, imposing a tax of ten mills upon national bank stocks, when three mills was the tax imposed on money of individual citizens, is unauthorized. *Ibid.*

The capital stock of national banks is liable to taxation for county purposes. *Everett v. Steele et al.*, 170.

BANKRUPT.

A bankrupt, who is endorser of certain promissory notes, drawn, dated, signed and endorsed at Philadelphia where both the drawers and himself reside, but which were delivered and discounted at usurious rates of interest in New York, cannot be made liable as endorser, as the notes are void. *In re Peter Conrad, bankrupt*, 284.

A bill for specific relief to compel the respondents to surrender to the trustees of a bankrupt's estate, certain property conveyed by the bankrupt to them, to secure the payment of their claim, or in the event of their not doing so that their claim be disallowed, was dismissed, the court having already decided upon an appeal by the complainant, that the claim of the respondents was void. *Dallas v. Flues & Co.*, 288.

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CITY OF PHILADELPHIA.

See also **MUNICIPAL CLAIMS, AND STREETS.**

Under section 35, act of February 2d, 1854, the city councils have exclusive and final jurisdiction to try contested elections of their own members. *Snyder v. Smith et al.*, 35.

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Under the ordinance directing that all leases and sales of property of the city of Philadelphia, must be made at public auction, the rejection of any bid by the city must be at the auction and before the hammer is brought down. *Kerr & Bro. v. The City et al.*, 254.

The commissioner of highways of the city of Philadelphia, must by an ordinance of the city, award contracts for paving streets, to the person selected by a majority of the property owners along the streets to be paved. *Keely et al. v. Dickinson et al.*, 257.

An ordinance of the city of Philadelphia, passed over the mayor's veto, on a second reconsideration and after the charter test had decided it in the negative, is unconstitutional and void. *Sank et al. v. The City of Philadelphia*, 359.

In an appropriation ordinance an item, "for construction of large storage reservoir, East Fairmount Park, \$1,335,000," is not sufficiently itemized. *Ibid.* There is no doubt of the right of tax payers to bring a bill of complaint to enjoin the operation of a city ordinance. *Ibid.*

An injunction restraining the temporary blocking up of certain streets of the city of Philadelphia, by hauling bulky articles over them, was dissolved. *Passenger Railway Co. v. Morris*, 295.

There being no express contract between the proper city authorities and an architect, employed by a committee of councils, to superintend the construction of a proposed house of correction, equity will not interfere to restrain another architect from acting. *Windrim v. The City*, 311.

The house of correction being a public work in progress of erection, the act of April 8th, 1846, forbids the granting of an injunction to restrain the work from going on. *Ibid.*

The city treasurer has a right to resign his office, but he cannot, by such resignation, take from the city any remedy for wrongs committed by him during his term of office. *City of Philadelphia v. Marcer*, 355.

A writ of sequestration shall issue against the city treasurer upon the proper affidavit and cause shown, and does not depend upon his suspension from office by councils. *Ibid.*

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The city of Philadelphia and the passenger railway companies are both liable in damages for neglect to repair the streets over which the railway tracks are laid. *City v. Weller*, 400.

The act of Assembly incorporating the City Sewerage Utilization Company is not contrary to the clause in the State constitution which directs that the Legislature shall pass no bill containing more than one subject. *Sewerage Co. v. Board of Health*, 403.

Cleaning the streets of the city is not "a public work erected, or in progress of erection," in the contemplation of the act of Assembly forbidding courts to interfere by injunction with the erection or use of such public works. *Ibid.*

CITY OF PHILADELPHIA.—Continued.

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COLLATERAL INHERITANCE TAX.

A devise of a yearly ground rent to a granddaughter, to be paid upon her attaining the age of twenty-five years, and if she should die before attaining that age, then to be divided among her sisters and brother surviving, is not subject to collateral inheritance tax, although the event of her so dying had happened. *Estate of Virginia Johnson*, 28.

The sisters and brother took the ground rent by virtue of the limitation to them in their grandfather's will, and not under the intestate law. *Ibid.*

COLLISION.

A collision between a moving vessel and one at anchor, caused by the incautious navigation of the moving vessel in a place that required cautious movement, will not render the vessel at anchor liable for damages, even though her light be defective. *The Scottish Bride v. The Anthony Kelly*, 289.

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The placing of a person in an insane asylum by her relations, under a belief by them of the insanity of such person, is not *per se* evidence of a criminal conspiracy. *Com. ex rel. Mintzer v. The Sheriff*, 340.

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CONSTITUTIONAL LAW.

Congress, in establishing a uniform system of bankruptcy, has power to provide a uniform rule on the subject of limitation of actions. *Peiper v. Harmer*, 162.

An expository law is destitute of retroactive force, because it is an act of judicial power, and in contravention of the constitution of Pennsylvania. *I. B. Parker's Estate*, 331.

The amendment to the constitution of Pennsylvania, which directs that the Legislature shall pass no bill containing more than one subject, was intended to prevent the embracing in one bill subjects which were foreign to one another. *Sewerage Co. v. Board of Health*, 403.

CONSTRUCTION OF WILLS.

A devise to a granddaughter, and if she should die before attaining the age of twenty-five years, then to her sisters and brother, is not subject to collateral inheritance tax. *Estate of Virginia Johnson*, 28.

The sisters and brother took by virtue of the limitation to them in their grandfather's will, and not under the intestate law. *Ibid.*

In the instrument executing a power there must either be some reference to the power or to the property upon which it is to operate. *In re Bingham's Estate*, 81.

A testator domiciled in Pennsylvania created a power of appointment to be

CONSTRUCTION OF WILLS.—Continued.

executed by his son; the son being domiciled in England, made a will which did not mention or refer to the power. *Held*, not a valid execution of the power. *Ibid.*

The deed or will creating a power, and the deed or will executing it, make but one instrument. *Ibid.*

The law of the domicile of the *donor* of the power must prevail in determining under which law the estate passes. *Ibid.*

A bequest to a person for life, or during widowhood, and after her decease or marriage to testator's grandchildren, to be held for their use, and the capital to be paid to them as they respectively attain the age of 31 years, or as they become married, gives a vested interest to the grandchildren. *Provenchere's Estate*, 68.

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A bequest of an annuity to maintain and educate a nephew at a certain institution, "for the purpose of preparing him for the ministry of the Presbyterian Church," was held to be good according to the doctrine of *cy pres*, notwithstanding such institution did not exist. *Haddeson's Estate*, 336.

A bequest of a sum of money "to be divided among my brothers and their male heirs," is an absolute gift to his brothers living at the time of testator's death, the words "and their male heirs" being words of limitation and not words of purchase. *Ibid.*

A bequest of personal property for life gives the donee the right to consume such articles as could not be enjoyed without consuming them. *Deighmiller's Estate*, 499.

When personal property is bequeathed to one for life, with remainder over, the rights of the remainderman are governed entirely by the intention of the donor as ascertained from the will. *Ibid.*

A special trust to an executor to hold personal property for the use and support of a married woman, gives him the sole right of possession, subject to payments for her support, as provided for in the will. *Coulter et al. v. Bortner et al.*, 505.

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Where there is no allegation of fraud or mistake in the execution of an agreement, or of doubt or uncertainty in its terms, or of oppression or want of equity in the agreement itself, or its effects and consequences, equity will not interfere to cancel or reform it. *Miller v. Sellers et al.*, 45.

In no event can such an instrument be cancelled for matter *dehors*, or which flows naturally from the powers and rights conferred by the instrument itself. *Ibid.*

In computing the sixty days within which an offer of sale was to be accepted, the day of the date of the offer is excluded. *Serrill v. Burk*, 489.

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CONVERSION.

When land is converted into money under a judicial proceeding, it must be distributed over afterwards as money. *Snyder's Estate*, 481.

Land so converted, by proceedings in partition, is still treated as land. *Ibid.*

CORPORATIONS.

See also MUNICIPAL CORPORATIONS.

Active, contributing, life and honorary members of fire companies in the city of Philadelphia are equal in their rights to all the essential privileges of membership. *Riddell v. Harmony Fire Co.*, 316.

There can be no dissolution of these corporations except in the mode pointed out by act of Assembly. *Ibid.*

So long as a corporation exists, its property must be preserved to subserve the general purpose and interests of the body. *Ibid.*

A corporation cannot make a by-law which contravenes the provisions of its charter. *Potts v. Association for Relief of Firemen*, 369.

Where property is held by an association in trust to be applied to purposes of charity, it cannot be applied to different objects. *Ibid.*

A proposition to pay members a portion of the funds of the society, so held in trust, is illegal. *Ibid.*

An honorary member of a fire company in the city of Philadelphia, is entitled to all the privileges of honorary members, even though there has been a non-user by him of such privileges. *Harmstead v. Washington Fire Co.*, 393.

A fire company having passed a resolution prohibiting any further payment of dues by contributing members, cannot afterwards expel such contributing members for not paying or not tendering payment of dues. *Freiberg et al. v. Reliance Fire Co.*, 394.

COSTS.

Upon a preliminary injunction being dissolved, because of conflicting evidence, each party should pay his own costs. *Smith v. Schmidt*, 58.

In taxing costs under the equity rules of the Supreme Court of Pennsylvania, no allowance will be made for printing examiners' reports. *Rogers v. Williams et al.*, 418.

COUNCILS.

In presenting a petition contesting the seat of a member of councils, the day of organization is excluded from the ten days allowed. *Snyder v. Smith et al.*, 35.

The city Councils of Philadelphia have exclusive and final jurisdiction to try contested elections of their own members. *Ibid.*

Councils may authorize the widening and straightening of streets, requests to improve the approaches to Fairmount Park. *In re Thirty-fourth Street*, 129.

An ordinance of councils passed over the mayor's veto, on a second reconsideration and after the charter test had decided it in the negative is unconstitutional and void. *Sank et al. v. City of Philadelphia*, 259.

Under the act of Assembly of March 31st, 1860, section 66, members of councils, who become sureties on an official bond, during their tenure of office, either disqualify themselves or work a forfeiture of their right to hold their offices. *Commonwealth v. Allen et al.*, 408.

The councils can alone determine the question of the qualification of their members. *Ibid.*

COUNSEL.

Counsel will not be compelled to divulge confidential communications. *Ashton v. Parkinson*, 99.

COUNSEL FEES.

An executor or administrator is entitled to professional advice and assistance. *In re Bingham's Estate*, 31.

Parties sustaining or opposing a will should pay their own counsel fees. *Ibid.*

Counsel fees and expenses of legal proceedings allowed to a guardian where his action was proper and resulted in a benefit to the whole estate. *Buist's Estate*, 226.

COVENANT.

The action upon a covenant under seal must be in the name of the covenantee. *M. C. R. R. Co. v. The S. R. R. A.* 177

CRIMINAL LAW.

In an indictment for abortion, where one of the defendants, before the trial, marries the woman on whom it was alleged the abortion took place, the wife was permitted to testify against the other defendant on his separate trial. *Commonwealth v. Reid*, 182.

A public examination in the hearing of the panel of jurors, as to the absence of a witness in the cause to be tried, is not error. *Ibid.*

The term "quick with child" expresses the time subsequent to the mother feel-

CRIMINAL LAW.—Continued.

- ing the child quicken; the quickening is the incident, not the inception of vitality. *Ibid.*
- In collateral proceedings the husband or wife may testify to facts tending to criminate each other. *Ibid.*
- The placing of a person in an insane asylum by her relations, under a belief by them of the insanity of such person, is not *per se* evidence of a criminal conspiracy. To render such act criminal it must be shown to have been done with a corrupt motive. *Com. ex rel. Mintzer v. The Sheriff*, 340.
- The differences between murder and manslaughter explained in the judge's charge to a jury. *Commonwealth v. Schoeppe*, 433.
- Murder perpetrated by poison is murder in the first degree, unless it be given through accident or mistake. *Ibid.*
- A writ of error sued out with the consent of the attorney general in writing, under section 33 of act of Assembly of March 31st, 1860, is simply a writ of error at common law. *Schoeppe v. Commonwealth*, 452.
- On the hearing of a writ of error at common law, no errors can be assigned but those which were apparent on the face of the record itself. *Ibid.*
- A conviction for misbehavior in office requires the removal of the officer convicted. *Commonwealth v. Harris*, 455.
- Temporary separation of the jury in a capital case is not ground for a new trial, where the jurors were always under the care and surveillance of the sworn officers of the court. *Commonwealth v. Britton*, 513.

CRIMINAL PRACTICE.

- The district-attorney in drawing an indictment is not bound by the exact phraseology of the alderman; he may mould his indictment to suit the facts of the case, so that he do not charge another and distinct offence. *Commonwealth v. Manderfield*, 37.
- In an indictment for libel, where the words charged as libellous do not necessarily import criminality, they can, in pleading only support the indictment by reference to extrinsic circumstances. *Commonwealth v. Stacy*, 114.
- The commonwealth can only be held to alternate challenges of jurors when the box is full. *Commonwealth v. Reid*, 183.
- The wife of a co-defendant not upon trial, may be examined as a witness for the commonwealth, upon the separate trial of the other defendant. *Ibid.*
- In an indictment for bribery, an allegation that the accused did "offer and propose" to do a certain act, is sufficient. *Commonwealth v. Harris*, 455.
- Technical mistakes in indictments may be amended by permitting the use of words which legally import the offense, substantially charged. *Ibid.*
- The preliminary proof necessary before dying declarations can be given in evidence, is that the declarant was about to die and knew his condition. *Commonwealth v. Britton*, 513.
- Upon a trial for murder by stabbing, evidence of threats made by the prisoner at a time previous to the commission of the crime, was held to be competent to show the degree of guilt. *Ibid.*

CUSTODY OF CHILDREN.

- A parent may relinquish the custody of his child by parol or by abandonment, &c. *Commonwealth v. Dougherty*, 63.

CY PRES.

- The meaning of the doctrine of *cy pres* is, that when a definite function or duty is to be performed, and it cannot be done in exact conformity with the scheme of the person who has provided for it, it must be performed with as close approximation to that scheme as is reasonably practicable. *Haddleson's Estate*, 336.

DECEDENTS' ESTATES.

- Charges for refreshments, probably liquors, furnished to a sailor, will not be allowed in settling his estate. *Gibbons' Estate*, 10.
- The burden of proof is upon the executors to show that moneys for which they have charged themselves in their account, arose from the conveyance of articles contained in the inventory. *Kulp's Estate*, 13.
- Where assets of a decedent's estate lie in different States, the executors should settle the account in the forum of the domicile. *Parker's Estate*, 15.
- Personal estate of a decedent, for the purpose of succession and distribution, is to be regarded as having no other locality except that of his domicile. *I. B. Parker's Estate*, 338.

DECREE.

The power of the Orphans' Court to review its decrees existed before the act of Assembly of Oct. 13th, 1840, and that act does not take it away. *Curry's Estate*, 484.

DESEPTION.

Where the husband had his domicile in Delaware, deserted his wife in Massachusetts, and was arrested on the charge of desertion in the city of Philadelphia, the court at the latter place had no jurisdiction. *Commonwealth v. Bailey*, 87.

DEVISAVIT VEL NON.

See **ISSUE DEVISAVIT VEL NON.**

DEVISE.

Where the meaning of a devise is uncertain, the law adopts the principles of the intestate law. *Cresson's Estate*, 219.

DISCONTINUANCE.

Discontinuance of a suit for divorce must always be, by express leave of the Court. *Murphy v. Murphy*, 305.

A discontinuance of proceedings in divorce, cannot be entered as of a day anterior to the bringing of a second suit, after the second suit has been commenced. *Ibid.*

DISTRIBUTIVE SHARE.

Each distributee is entitled to his share of coin in coin, if he so desire. *Parker's Estate*, 15.

DISTRICT ATTORNEY.

The district attorney, in drawing an indictment, is not bound by the exact phraseology of the alderman; he may mould his indictment to suit the facts of the case, so that he do not charge another and distinct offence. *Commonwealth v. Manderfield*, 87.

DIVORCE.

Discontinuance of a suit for divorce must always be, by express leave of the court. *Murphy v. Murphy*, 305.

The court must be satisfied that every rule of its own has been strictly followed, and every requirement of the law has been established by proof, before they can decree a divorce. *Ibid.*

DOMICILE.

A testator domiciled in Pennsylvania created a power of appointment to be executed by his son; the son, being domiciled in England, made a will which did not mention or refer to the power: *Held*, that the law of the domicile of the donor of the power must prevail in determining under which law the estate passes. *In re Bingham's Estate*, 31.

Where a legatee and the executors both reside in the same jurisdiction, the Orphans' Court will order the payment of the income due the legatee from the estate, although the income was received in another State. *Parker's Estate*, 15.

The domicile of the husband draws to it the domicile of the wife. *Commonwealth v. Bailey*, 87.

DONATIO CAUSA MORTIS.

Although a gift *causa mortis* may be revoked during the lifetime of the donor, it cannot be done by will, as that does not go into effect until after death. *Parthimer's Estate*, 478.

A *donatio causa mortis*, if valid, goes into effect from the time of the donation, not from the death of the donor. *Ibid.*

DOWER.

See also **WIDOW.**

Land in which the widow is entitled to dower, when converted into money by proceedings in partition is still treated as land, of which she is tenant in dower. *Snyder's Estate*, 481.

It is real, not personal property, and must be conveyed as other real estate. *Ibid.*

DYING DECLARATIONS.

In order to admit dying declarations in evidence, they must have been made under the declared apprehension of death, or in such imminent danger of it as must necessarily have raised that apprehension in the mind of the declarant. *Commonwealth v. Britton*, 513.

ECCLESIASTICAL LAW.

The rector of a Protestant Episcopal Church can only be removed in accordance with the constitution and canons of that church. *Batterson et al. v. Thompson et al.*, 171.

EMIMENT DOMAIN.

In Pennsylvania, real estate is held subject to the right of eminent domain. *In re Connecting Railroad*, 27.

The individual property of a citizen will not be appropriated to public use unless there is a manifest purpose in the law authorizing it. *Lodge v. Railroad Company*, 131.

Where land is appropriated to the use of a public highway, the fee remains in the former owner. *Junction R. R. Co. v. Boyd*, 107.

On the abandonment or disuse of the land as a way, the owner can reclaim or occupy it. *Ibid.*

EQUITABLE ESTATE.

An agreement for the purchase of real estate vests an equitable estate in the purchaser. *Greaves v. Gamble*, 1.

EQUITY.

A court of equity cannot arrest *in limine* the proceedings of a quasi political body having power to determine its own jurisdiction, for every seeming departure in the exercise of its powers. *Snyder v. Smith et al.*, 35.

Equity will not enjoin to enforce a naked promise, not in writing, no resulting trust arising from such promise under the act of Assembly of April 23d, 1856. *Whetham v. Clyde*, 53.

Where one signs a judgment note, the contents of which are explained to him, he cannot have an injunction to restrain proceedings thereon upon the ground of fraud. *Steinbaker v. Wilson & Young*, 76.

Equity will enforce a bond conditioned that the vendor of a milk route will not sell milk on the route, it not being in constraint of trade. *Reece v. Hendricks*, 79.

An injunction to restrain the execution of a writ of *habere facias possessionem*, will not be awarded, when the court has already decreed possession of the premises in question to the party taking out the writ, even though it be a great hardship upon the tenant. *Fox v. Watts et al.*, 81.

Where a wife neglects to appeal from the judgment of an alderman, equity will not interfere to restrain an execution thereon against her separate estate. *Smith et al. v. Moyer et al.*, 86.

- Equity cannot be used to obstruct the collection of debts. *Ashton v. Parkinson*, 99. Counsel will not be compelled to divulge confidential communications of their clients. *Ibid.*

Equity will enjoin the obstruction or occupation of land taken by a railroad company for their use, though they be not the owners of the fee. *Junction R. R. Company v. Boyd*, 107.

Where an act of Assembly confers a special jurisdiction on any particular tribunal in regard to any class of cases, a court of equity will not assume jurisdiction. *Bailey v. Fitzpatrick*, 126.

Courts of equity have jurisdiction over cases of purpresture and nuisance. *City v. The Railway Co.*, 163.

Equity will not restrain a proceeding at law to recover a judgment against the plaintiffs, admitted to be due from them. *Metz Bros. v. Farnham et al.*, 201.

An account will not be decreed where the plaintiffs are indebted to the defendants. *Ibid.*

Where an act of Assembly, creating a building commission, has been declared constitutional by all the judges of the Supreme Court at *nisi prius*, the court will not interfere to restrain said commissioners from acting, on the ground that the act of Assembly was unconstitutional. *Wheeler v. Rice et al.*, 218.

A decree for an account will not be made where it is doubtful, if there is a liability to account. *Danzisen v. Miller*, 215.

Equity will cancel an instrument for matter *dehors*, or which flows naturally from the powers and rights conferred by the instrument itself. *Miller v. Sellers et al.*, 245.

Where the plaintiff's wrongful acts have contributed to the injury complained of, or where it is not clear that the acts of the defendants are not warranted by the express terms or spirit of the agreement, a court of equity will not exercise its summary power of injunction. *Miller v. Sellers et al.*, 245.

There is no doubt of the right of tax payers to bring a bill of complaint to enjoin the operation of a city ordinance. *Sank et al. v. The City of Philadelphia*, 259.

EQUITY.—Continued.

Where an architect, employed by a committee of councils of the city of Philadelphia, had entered into no express contract with the proper city authorities, an injunction will not be issued to restrain the employment of another architect in his place. *Windrim v. City of Philadelphia*, 311.

The House of Correction being a public work in progress of erection in that city, an injunction cannot be issued to restrain the work from going on. *Ibid.*

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Equity will not interfere to restrain proceedings under the act of June 16th, 1836, to obtain possession of property purchased at sheriff's sale, where such proceedings are regular, even though the property had been sold without notice to the owner. *Brady v. Weightman et al.*, 347.

To obtain an injunction to stay legal proceedings, the necessity should be urgent and the case free from doubt. *Hartnack et al. v. James et al.*, 364.

Whenever a court of equity originally has jurisdiction of the cause of complaint, and for any reason it becomes impracticable to give the relief specifically cited, it may substitute compensation in damages. *Mayer v. Simpson*, 406.

A bill in equity will not lie for a mere trespass, certainly not, if the trespass be of a fugitive and temporary character, and adequate compensation can be obtained in an action at law. *Gorrell et al. v. Murphy et al.*, 493.

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Where the evidence is conflicting and the court are unable to determine on which side it preponderates, a preliminary injunction will be dissolved and the parties sent to their remedy at law. *Smith v. Schmidt*, 58.

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Where infringement of a patent is alleged in the bill, the respondents are bound to answer it, distinctly and unequivocally. *Jordan v. Wallace et al.*, 354.

Where several matters, which all arose out of and were dependent upon one contract, were contained in the bill, it was held that they were properly joined. *Brady et al. v. Shisler*, 395.

Leave was granted to file an amended answer upon an honest mistake. *Johnson v. Thomas' Sale*, 413.

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Where a party seeks to enforce a trust, which the bill shows is not manifested

FORGERY.

In Pennsylvania, handwriting may be the subject of judicial inquiry in at least three ways; by the testimony of experts, by the evidence of those familiar with the handwriting, and by the comparison by the jury themselves of the disputed writing, with a test paper admitted or proved to be genuine. *Otterson et al., v. Middleton*, 539.

FUNERAL EXPENSES.

Large expenditures for burials are condemned. *McKenna's Estate*, 13.

GUARANTEE.

Where a note is endorsed for the purpose of guaranteeing payment of it by the maker to the defendants, they cannot prove such guarantee by parol. *Adler et al. v. Teller et al.*, 224.

GUARDIAN.

Sale of a ward's real estate by the guardian requires the sanction of the court of the county where the land is situate. *Packer's Estate*, 5.

Guardians can receive, sue for and recover assets wherever found within the State, without the special leave or reappointment of the courts in different counties. *Ibid.*

In the appointment of guardians, the Orphans' Court of each county has jurisdiction only where the minors reside within such county. *Ibid.*

The security, however, is to be approved of by the court having jurisdiction of the guardian's accounts. *Ibid.*

The forum of the appointment of a guardian must be the forum of account and removal. *Ibid.*

A mother in Pennsylvania cannot appoint a testamentary guardian of her child. *In re Fanny Pratt*, 56.

In the appointment of guardians, persons of the same religion as the minors should be preferred whenever practicable. *Ibid.*

A guardian may be removed by the Orphans' Court, where there was a suppression of facts upon his application for his appointment. *Ibid.*

The appointment of a guardian gives him no legal control of the property of his ward outside the commonwealth. *Milligan's Estate*, 208.

The guardian should not be surcharged with an amount not actually received by him, unless it be shown that it belonged to his wards, and could have been collected. *Ibid.*

A foreign guardian may, in the discretion of the court, be appointed in Pennsylvania, upon giving security. *Ibid.*

A guardian's triennial accounts should be filed in the Orphans' Court. *Ibid.*

Where the guardian and his ward, upon the latter becoming of age, state and account, and the ward agrees to it, the guardian should not be surcharged with anything outside of it. *Ibid.*

There can be no such thing as a guardian of a dead child. Guardianship ceases with the death of the child. *Bruce's Estate*, 226.

Money due a minor and not received by his guardian prior to his death, goes to his legal representatives. *Ibid.*

Counsel fees and expenses of legal proceedings allowed to a guardian where his action was proper, and resulted in a benefit to the whole estate. *Ibid.*

A guardian should sign the indenture of apprenticeship of his minor ward. *Commonwealth v. Atkinson*, 233.

A guardian is entitled to all such reasonable allowances as any other trustee would be. *McNickie v. Henry*, 416.

Where a guardian is shown to have received money of his ward, interest is of course, after a proper time for investment and without more appearing, always charged. *Emery's Estate*, 485.

HIGHWAYS.

See **STREETS**.

HUSBAND AND WIFE.

An injunction will not be granted to restrain the sale of the wife's property on an execution against the husband, unless he clearly have no interest. *Boyle v. Ramsey*, 45.

Where a wife neglects to appeal from the judgment of an alderman, equity will not interfere to restrain an execution thereon against her separate estate. *Smith et al. v. Moyer et al.*, 86.

The domicile of the husband draws to it the domicile of the wife. *Commonwealth v. Bailey*, 87.

HUSBAND AND WIFE.—Continued.

A wife cannot transfer her certificates of loan of the city of Philadelphia, without her husband. *Kean v. City*, 180.

The wife of a co-defendant not upon trial may be examined as a witness for the commonwealth, upon the separate trial of the other defendant. *Commonwealth v. Reid*, 182.

In collateral proceedings the husband or wife may testify to facts tending to criminate each other. *Ibid.*

The purpose of granting the privilege of *seme sole* trading is to enable a wife, by working at some trade, to acquire the means of self-support. *Cochran v. Garritson*, 218.

An execution will not issue against the separate property of the wife for her debt for necessaries for the support of her family, until the property of the husband be first exhausted. *Stiles v. Jeffries et al.*, 300.

IMPLIED TRUST.

See TRUST.

INCORPORATION.

Enumeration of the requisites to obtain a charter from the Court of Common Pleas. *In re Artisans' Institute*, 104.

INDICTMENT.

In drawing an indictment, the district attorney is not bound by the exact phraseology of the alderman; he may mould his indictment to suit the facts of the case, so that he do not charge another and distinct offence. *Commonwealth v. Manserfield*, 37.

An indictment for being concerned in a lottery, should show upon its face that the lottery complained of was illegal. *Ibid.*

INJUNCTION.

See also EQUITY.

An injunction, being not of right but of grace, should not be granted except in a clear case and to arrest a palpable abuse of authority resulting in some irreparable injury. *Snyder v. Smith et al.*, 35.

An injunction will not be granted to restrain the sale of the wife's property on an execution against the husband, unless he clearly have no interest. *Boyle v. Ramsey*, 45.

There being a full denial of the equity of the plaintiff, and the facts not free from doubt, an injunction will not be awarded. *Whetham v. Clyde*, 53.

Where the evidence is conflicting, and the court has no clear conviction from it, an injunction will not be granted. *Smith v. Schmidt*, 58.

An injunction will not issue upon a bill sworn to by the plaintiff and fully denied by the defendant, without further proof. *Ashton v. Parkinson*, 99.

When the injury complained of does not effect the rights of the plaintiff under a contract, or where the relief prayed for would give him no benefit under the contract, a court of equity will not exercise its summary power of injunction. *Miller v. Sellers et al.*, 245.

To obtain an injunction to stay legal proceedings, the necessity should be urgent and the case free from doubt. *Hartnack et al. v. James et al.*, 304.

INSANE ASYLUM.

The placing of a person in an insane asylum by her relations, under belief by them of the insanity of such person, is not *per se* evidence of a criminal conspiracy. *Commonwealth ex rel. Mintzer v. The Sheriff*, 340.

INSANE PERSONS.

See LUNATICS.

INSOLVENT.

A claim for rent of premises occupied by the assignors, which fell due after an assignment by them for the benefit of creditors, is not entitled to have a dividend paid upon it. *Estate of Snyder & Cadwallader*, 302.

INTEREST.

A legatee was not allowed interest on her legacy, when she received her full distributive share of the estate, upon the items of which interest had already been charged. *Kulp's Estate*, 13.

Interest is the penalty which the law imposes for non-payment, and should be charged when due. *Nobitt et al. v. Briggs et al.*, 236.

Undoubtedly interest may be recovered upon arrearages of rent, but there are cases in which it may be refused. *Makinson's Estate*, 320.

A guardian is chargeable with interest upon money received for his ward, after a proper time for investment. *Emery's Estate*, 485.

INVENTION.

See also **PATENT.**

The patentability of an alleged invention is in many cases, most satisfactorily shown by its utility. *Salt Manufacturing Co. v. Thomas & Barry*, 275.

INVENTORY.

An auditor of an executor's account is not bound to accept the inventory as the basis of his report. *Kulp's Estate*, 18.

ISSUE DEVISAVIT VEL NON.

An issue was refused where the testimony merely showed that the testator was suffering from the infirmities of old age, *Woodfall's Will*, 66.

The register's award of an issue is a subject of review in the Register's Court. *West's Will*, 95.

Where there is evidence of a contested fact touching the validity of a will, it is proper for the register to grant an issue. *Ibid.*

Facts averred in a caveat filed by the contestant of a will, being sufficiently disputed in the opinion of the court, an issue *devisavit vel non* was awarded. *In re McCarter's Will*, 297.

A formal request for an issue was directed to be filed *nunc pro tunc*. *Ibid.*

In Pennsylvania, handwriting may be the subject of judicial inquiry in at least three ways; by the testimony of experts, by the evidence of those familiar with the handwriting, and by the comparison by the jury themselves of the disputed writing with a test paper admitted or proved to be genuine. *Otterson et al. v. Middleton*, 529.

In the trial of a feigned issue to determine the validity of a will, it is contrary to the usual practice for the plaintiffs after proof of the will by the attesting witnesses to present their whole case to the jury. *Ibid.*

JUDGE.

A judge may rightfully express his opinion respecting the evidence. *Commonwealth v. Landa*, 43.

JUDGMENT.

A judgment of *non pros* for want of a narr. cannot be entered pending exceptions to bail. *Hanbest v. Donnelly*, 10.

JURISDICTION.

Proceedings of the Fairmount Park commissioners on the taking of the land within the park limits, of a citizen of New York, are not such a suit as can be removed to the U. S. Circuit Court under the acts of Congress. *White v. The City*, 140.

JURORS.

In an inquisition concerning a turnpike company, the fact that the jurors have paid toll to the company, is not a disqualification. *In re Turnpike Co.*, 252.

Temporary separation of the jury in a capital case is not ground for a new trial, where the jurors were always under the care and surveillance of the sworn officers of the court. *Commonwealth v. Britton*, 513.

JUSTICE OF THE PEACE.

See **ALDERMEN.**

LACHES.

Equity will not extend to every case of laches of parties to a suit at law. *Smith et al. v. Moyer et al.*, 86.

LAND DAMAGES.

In distributing the fund arising from damages for land taken by the city of Philadelphia, the auditor was right in distributing the fund to the lien creditors as well as to the administrator. *Makinson's Estate*, 320.

LANDLORD AND TENANT.

A three months' notice to quit March 25th, is in time if served December 25th, previous. *Ogden v. Druffy*, 4.

Where possession has been adjudged to the executor of a lessor, the court will not restrain him from prosecuting a writ of *habere facias possessionem*. *Fox v. Watts et al.*, 81.

In summoning a jury in a landlord and tenant proceeding, the sheriff must perform the duty himself, and not by deputy. *McMullen v. Orr*, 92.

Upon proper proofs of partiality, corruption or extortion, the court will set aside the proceedings of the sheriff's jury. *Ibid.*

A general receipt for rent given by the lessor to the tenant in possession, who is

LANDLORD AND TENANT.—Continued.

the assignee of the unexpired term of the lease, is not an implied letting to the tenant for a new term. *Hartnack et al. v. James et al.*, 364.

The landlord and tenant act of February 28th, 1865, does not require it to be shown that the defendant's term in the premises had terminated. *Mooney v. Rogers*, 385.

A simple claim of title though fortified by oath, is not enough to divest the jurisdiction of the alderman in proceedings under said act; it must appear that such claim may be a defence. *Ibid.*

Under the landlord and tenant act of April 3d, 1830, where the requisite notice to quit is not given, and a person not the lessor makes the oath, all the subsequent proceedings are irregular. *Hopkins v. McClelland*, 388.

If in the complaint under the landlord and tenant's act of March 25th, 1825, any of the necessary requirements of the act are wanting, aldermen are without authority to act. *Ercy v. Willbank*, 389.

Coal breakers, barns, houses, shops, factories and other improvements, must be included in the assessor's estimate of the value of real estate for taxing purposes, even though they be the property of a lessee. *Gorrell et al. v. Murphy et al.*, 495.

LEASE.

See **LANDLORD AND TENANT.**

LETTERS TESTAMENTARY.

U. S. revenue stamps on letters testamentary are affixed according to the value of the estate passing to or under the control of the executor. *In re Stamping etc.*, 67.

LIBEL.

Where the words charged to be slanderous or libellous, do not necessarily import criminality, they can in pleading only support an action or indictment by reference to extrinsic circumstances. *Commonwealth v. Stacy*, 114.

LIEN.

See **MECHANICS' LIEN.**

LIFE TENANT.

A bequest of personal property for life, gives the donee the right to consume such articles as could not be enjoyed without consuming them. *Deighmiller's Estate*, 499.

LIMITATION.

There is no law which limits the time for an owner to apply for viewers upon opening a road through his property. *In re Chew Street*, 19.

Congress in establishing a uniform system of bankruptcy, has power to provide a uniform rule on the subject of limitation of actions. *Peiper v. Harmer*, 162.

LOTTERY.

Because there may be such a thing as a legal lottery in Pennsylvania, an indictment for being concerned in a lottery should show upon its face that the lottery complained of was illegal. *Commonwealth v. Manderfeld*, 37.

The raffles, which occur almost daily, at the street corners, in bar-rooms, at fairs, and other places, are clearly violations of the criminal law. *Ibid.*

LUNATIC.

The alleged lunatic should be present at the meetings of a commission of lunacy. *In re Joshua Isaacs*, 17.

An application for the admission of a lunatic into a hospital must be by the legal guardian. *In re Louis E. Rosenberg*, 49.

A person appointed a committee or guardian of the lunatic, by an authority outside of Pennsylvania, possesses no legal authority in that State. *Ibid.*

MANIFEST.

By acts of Congress all masters of vessels are required to have a manifest of their cargo, and a forfeiture equal to the value of the goods not included in the manifest, is imposed. *United States v. The Stadacona*, 283.

MANSION HOUSE.

The inquest in partition must include the mansion house of the decedent. *Kline's Estate*, 428.

The widow of a decedent is entitled to the mansion house for life. *Ibid.*

MARRIAGE.

Reputation and cohabitation are presumptive proofs of marriage, but when either fails, the presumption of marriage may not be built upon the other. *Smyth's Estate*, 210.

MARRIED WOMEN.

See HUSBAND AND WIFE.

MECHANICS' LIEN.

A lien filed upon December 2d for a claim dated June 2d is within the six months required by the mechanics' lien law. *Esler v. Peterson*, 303.

In a mechanics' lien it is not necessary that the prothonotary should record upon the lien docket the bill of particulars. *Sunbury v. Wilbert*, 431.

MERCANTILE AGENCY.

A circular issued by a mercantile agency to its subscribers is not a privileged communication. *Commonwealth v. Stacey*, 114.

MERGER.

The act of Assembly of May 16th, 1861, authorizing merger of railroad companies, has no application to passenger railway companies. *City v. The Railway Co.*, 163.

MINORS.

The residence of a minor within the county, is the only test of the jurisdiction of the Orphans' Court of such county, in the appointment of guardians. *Packer's Estate*, 5.

Money due a minor and not received by his guardian prior to the death of the former, goes to his legal representatives. *Buist's Estate*, 226.

An indenture of apprenticeship should be signed by the master, the apprentice, and the latter's parent, guardian, or next friend. *Commonwealth v. Atkinson*, 233.

The next friend of a minor requires no formal appointment, but must have evinced, by his regard for the minor, an interest in his welfare. *Ibid.*

See also GUARDIAN.

MORTGAGE.

A declaration of no defence or set off on a mortgage avails a subsequent as well as the first assignee. *Burns v. Ashton*, 417.

A second assignee, to avail himself of such declaration, must be an assignee for value. *Ibid.*

MUNICIPAL CLAIMS.

Where a property is registered, notice of a claim for taxes must be served upon the owner. *City of Philadelphia v. Furista et al.*, 143.

The phrases "municipal claims" and "any claims in the name of the city of every kind," in the act of Assembly of March 23d, 1866, clearly include claims for taxes. *City v. Vandevier*, 397.

No proof of notice to the owner appearing in the proceedings, a judgment upon a city claim for taxes is void. *Ibid.*

MUNICIPAL CORPORATIONS.

An action brought by the inhabitants of one of the boroughs incorporated into a city, against the inhabitants of the whole city, for property belonging to the borough at the time of its incorporation, cannot be maintained. *The Borough v. The City of Oil City*, 502.

The property still belongs to the inhabitants for public use, under such control as shall be provided by the sovereign. *Ibid.*

MURDER.

See also CRIMINAL LAW.

The differences between murder and manslaughter explained in the Judge's charge to a jury. *Commonwealth v. Schoeppe*, 433.

NAME.

A name has, for certain purposes, a commercial value. *Gillis v. Hall*, 124.

NATIONAL BANKS.

See BANKS.

NEW TRIALS.

A new trial will not be granted upon evidence which is cumulative, and which was accessible for the first trial. *Commonwealth v. Schoeppe*, 450.

NOTICE.

Property of a defendant in Pennsylvania, may in some instances be sold without notice to him. *Brady v. Weightman et al.*, 347.

No proof of notice to the owner appearing in the proceedings, a judgment upon a city claim for taxes is void. *City v. Vandevier*, 397.

NUISANCE.

Courts of equity have jurisdiction over cases of purpresture and nuisance. *City v. The Railway Co.*, 163.

OBSCENITY.

Obscenity is a question for the jury, in a trial for publishing an obscene libel. *Commonwealth v. Landis*, 42.

OFFICE.

A conviction for misbehavior in office, requires the removal of the officer convicted. *Commonwealth v. Harris*, 455.

ORDINANCE.

See **CITY OF PHILADELPHIA**.

ORPHANS' COURT.

The jurisdiction of the Orphans' Court of each county, under the act of 29th March, 1832, sec. 5, in the appointment of guardians, is confined to cases where the minors are resident within such county. *Packer's Estate*, 5.

Where a legatee and the executors both reside in the same jurisdiction, the Orphans' Court will order the payment of the income due the legatee from the estate, although the income was received in another State. *Parker's Estate*, 15. The Orphans' Court has power to correct its own mistakes. *In re Fanny Pratt*, 56. The power of the Orphans' Court to review its decrees existed before the act of Assembly of Oct. 18th, 1840, and that act does not take it away. *Emery's Estate*, 485.

ORPHANS' COURT PRACTICE.

Large expenditures for burials are condemned. *McKenna's Estate*, 12.

An auditor of an executor's account is not bound to accept the inventory as the basis of his report. *Kulp's Estate*, 13.

A legatee was not allowed interest on her legacy, when she received her full distributive share of the estate, upon the items of which interest had already been charged. *Ibid.*

A power of sale given to executors is given *virtute officii*, and survives to administrators *de bonis non cum testamento annexo*. *Chew v. Evans*, 168.

A general power to sell will be conclusively presumed to be for payment of debts. *Ibid.*

A guardian's triennial account should be filed in the Orphans' Court. *Milligan's Estate*, 203.

A guardian's final account should not include any dealings with his ward after the latter comes of age. *Ibid.*

Both the rule of court and the act of Assembly concerning auditors' fees will be enforced upon exceptions. *Ibid.*

A citation without a petition will be quashed. *Cramp's Estate*, 209.

Where the personal property of a decedent was found to be \$60,000, and the inventory only showed \$20,490, *held*, that the accountant was properly surcharged with the difference. *Buist's Estate*, 226.

Whilst an executor or administrator is, by the law of Pennsylvania, allowed one year within which to settle his account, there is no law to prevent his doing so at an earlier day. *Ibid.*

The widow, to whom property is bequeathed, must be charged with its value at the date of her husband's death, less the amount of the debts proved within one year and the expenses of the administration. *Ibid.*

Where the widow has a life interest in the personal estate of a testator, she is entitled to retain possession of said estate, upon entering into such security as the Court may approve. *Ibid.*

Commissions of 2½ per cent. allowed to an accountant where the estate was large, and there were very few debts. *Ibid.*

Counsel fees and expenses of legal proceedings allowed to a guardian, where his action was proper and resulted in a benefit to the whole estate. *Ibid.*

Ancillary letters are taken out to enable a foreign executor to collect funds or property, not collectible within the jurisdiction of the domicile. *I. B. Parker's Estate*, 328.

Under an ancillary administration the residuum after the payment of domestic creditors, is to be transmitted to the Probate Court of the county of the domicile. *Ibid.*

Commissions of 5 per cent. allowed to executors on personalty; 2½ per cent. on securities invested by the testator in his lifetime and not changed; 3 per cent. for rents collected by an agent, who had been paid 5 per cent. for collecting;

ORPHANS' COURT PRACTICE.—Continued.

- and 3 per cent. for real estate, the title of which had been passed by them. *Coburn's Estate*, 333.
- A guardian is entitled to all such reasonable allowances as any other trustee would be. *McNickles v. Henry*, 416.
- A trustee is bound to keep up insurances which were on the property when it came into his hands. *Ibid.*
- An administrator *de bonis non cum testamento annexo* can sue the representative of his predecessor for assets actually converted. *Parrish v. Brooks*, 417.
- An assignee of a security standing in an executor's name, takes it with notice of a breach of trust if there is one. *Ibid.*
- The inquest in partition must include the mansion house of the decedent. *Kline's Estate*, 423.
- The notice of a widow's claim for \$300 of the personal estate of her deceased husband, was held to be too late when made after the inventory and appraisement had been made. *Maier's Estate*, 475.
- Where the husband is entitled to receive the share of his wife, upon giving satisfactory security, and neglects to do so, the money must be invested in the hands of a trustee. *Snyder's Estate*, 481.
- Notice of the filing of an account having been given as required by law, all persons are precluded from alleging ignorance of the fact. *Curry's Estate*, 484.
- Where a minor son is permitted to take out letters by the widow of a decedent, he is to be considered as her agent and cannot be held liable by her for losses happening through lack of judgment, discretion or otherwise. *Deighmiller's Estate*, 490.

PARLIAMENTARY LAW.

- An ordinance of councils of the city of Philadelphia, passed over the mayor's veto, on a second reconsideration and after the charter test had decided it in the negative, is unconstitutional and void. *Sank et al. v. City of Philadelphia*, 359.
- A by-law or regulation, which does not transcend the limit of establishing rules for good order and proper control of corporate interests and corporate members, is a legitimate and valid by-law. *Riddell v. Harmony Fire Co.*, 316.

PARTITION.

- The inquest in partition of a decedent's estate, must include the mansion house. *Kline's Estate*, 423.
- Heirs have the same interest in the share set apart for the widow, that they have in other portions of the estate arising from proceedings in partition. *Snyder's Estate*, 481.
- The conversion of land into money by partition is regulated by a different statute from that governing sales by executors for the payment of debts or maintenance of minor children. *Ibid.*

PARTNERSHIP.

- One partner agreeing to contribute money to a partnership, against another's knowledge of the business, the former cannot call upon the latter to bear part of the loss which accrued. *Everly v. Durborow*, 127.
- In settling a partnership account, everything growing out of it between the parties must be brought to an end. *Johnson v. Thomas' Sale*, 413.
- Debts due to a firm are as much the property of all the members and as necessary to enable the firm to liquidate its liabilities, as the stock in trade. *Lewis v. Patne et al.*, 508.
- An attachment execution, duly served upon a debtor of a partnership firm, will not hold the money for an individual debt owing by a member of the firm to the attaching creditor. *Ibid.*

PATENTS.

- The decision of the commissioner of patents upon the surrender of an original patent and the granting a re-issue of it, is final and conclusive. *Parham v. Machine Co. et al.*, 145.
- The only ground on which the allowance of a re-issue is objectionable, is where the commissioner has exceeded his authority. *Ibid.*
- An omission of part of the claim by the inventor in the re-issue, is not prohibited by the patent acts. *Ibid.*
- The modification of the description and claims of the original patent does not affect the validity of a re-issued patent, where the invention is the same. *Ibid.*
- The novelty and utility of a mechanical device are the tests of its patentable merit. *Ibid.*

PATENTS.—Continued.

Where a patent is claimed for an entire machine, it is necessary to describe all the parts necessary to its practical working and use. *Ibid.*

In a claim for an improvement it is necessary to describe the elements composing the improvement, with their relations to the other parts of the machine. *Ibid.*

The respondents having committed an infringement, a decree for an injunction and account will be entered. *Ibid.*

Where infringement of a patent is alleged in the bill, the respondents are bound to answer it distinctly and unequivocally. *Jordan v. Wallace et al.*, 354.

In the reissue of a patent, the patentee has a right to restrict or enlarge his claim so as to give it validity and effectuate his invention. *Salt Manufacturing Co. v. Thomas & Barry*, 375.

A patentable subject must be not only new and useful, but it must involve some exercise of the inventive faculty, and it must not be merely the application of an old thing to a new use. *Ibid.*

The patentability of an alleged invention is, in many cases, most satisfactorily shown by its utility. *Ibid.*

Patents are to be construed liberally, so as to sustain and not destroy the right of the inventor. *Francis et al. v. Mellor et al.*, 291.

The explanations contained in the specification are to be taken as the inventor's own interpreter of the meaning of his claim, and of the essential qualities of the invention protected by his patent. *Ibid.*

An admission by respondents that they manufacture certain compositions, from the same ingredients as those used by complainants, but that the proportions are different, and the proper adjustment of proportions in complainant's invention was essential to its sufficiency, is not an admission of an infringement but a denial. *Ibid.*

Where want of novelty in a machine patented was proposed to be shown on trial offers of evidence that did not propose to show that there were any previous machines suggestive of the machine in question, were excluded. *Butch v. Boyer*, 378.

PHILADELPHIA.

See CITY OF PHILADELPHIA.

POISONING.

Murder perpetrated by poison is murder in the first degree, unless the poison be given through accident or mistake. *Commonwealth v. Schoeppe*, 433.

PORT WARDENS.

The exclusive jurisdiction of revising the decisions of the board of port wardens of Philadelphia is in the Court of Common Pleas. *Bailey v. Fitzpatrick*, 126.

POWER.

In the instrument executing a power there must either be some reference to the power or to the property upon which it is to operate. *In re Bingham's Estate*, 81.

The deed or will creating a power and the deed or will executing it make but one instrument. *Ibid.*

The law of the domicile of the donor of the power must prevail in determining under which law the estate passes. *Ibid.*

A power of sale given to executors is given *virtute officii*, and survives to administrators *de bonis non cum testamento annexo*. *Chew v. Evans*, 168.

A general power to sell will be conclusively presumed to be for payment of debts. *Ibid.*

PRACTICE.

See also ORPHANS' COURT PRACTICE. EQUITY PRACTICE. CRIMINAL PRACTICE. REGISTER OF WILLS.

A judgment of *non pros.* for want of a *narr.* cannot be entered pending exceptions to bail. *Hardest v. Donnelly*, 10.

The proper remedy for an injury to plaintiff's horses and carts, resulting from placing posts in a private alley, is an action on the case. *Leary v. Horter*, 20.

An attachment will not issue against a witness, who refuses to answer, where he has a right so to refuse, even if he has partially testified. *Bast v. Anspach*, 25.

In case of sickness or absence of counsel, an honest application for a continuance of a cause should be respected. *McMullen v. Orr*, 44.

A rented safe in a safe deposit company, is not subject to attachment under the act of June 16th, 1836, sec. 35. *Gregg v. Wilson*, 128.

Claim for damages for the taking of land within the limits of Fairmount Park,

REGISTER'S COURT.—Continued.

the mother of the administratrix was the wife of said decedent. *Smyth's Estate*, 210.

Where no formal request for an issue *devisavit vel non* had been made, the court directed that it should be filed *nunc pro tunc*. *McCartier's Will*, 227.

REGISTER OF WILLS.

The register's award of an issue *devisavit vel non* is a subject of review in the Register's Court. *West's Will*, 95.

The register has power to hear testimony for and against an alleged will, even though the caveat contained no allegations or demand for an issue. *Tillow's Will*, 97.

The register cannot issue letters of administration to a stranger in blood, to the exclusion of any of the kindred willing and competent to undertake the trust. *Abie's Estate*, 420.

The act of the register in revoking letters is a unit, and cannot be partial, but must be of the letters as a whole. *Ibid.*

In the grant of letters the register should *ceteris paribus*, prefer the eldest of a class. *Ibid.*

RELIGION.

In the appointment of guardians, persons of the same religion as the minors should be preferred, whenever practicable. *In re Fanny Pratt*, 56.

If a father abandons his child, he loses all control over its religious as well as its temporal welfare. *Commonwealth v. Dougherty*, 63.

REMAINDER.

In cases of doubtful construction the law leans in favor of a vested rather than a contingent remainder. *Cresson's Estate*, 219.

RENT.

An agreement to pay rent is not a contract to pay a debt. *Estate of Snyder & Cadwallader*, 302.

There is no difference in principle between a ground rent in fee and rent reserved upon a term of years. *Ibid.*

REPUTATION.

Reputation and cohabitation are only presumptive proofs of marriage. *Smyth's Estate*, 210.

RES ADJUDICATA.

Equity will not interfere to restrain certain commissioners from acting, on the ground that the act of Assembly creating them is unconstitutional, when the court has already decided the act to be valid. *Wheeler v. Rice et al.*, 213.

RESULTING TRUST.

See TRUST.

ROAD JURY.

Where there is a conflict of testimony, the court will not interfere with the award of a road jury. *In re Verres Road*, 18.

Where the entire damages were laid upon the city of Philadelphia for the widening of a street already opened, the report of the jury was set aside. *In re Powellton Avenue*, 112.

After the report of a jury to assess damages for opening a railroad through land, the court will not admit an answer *nunc pro tunc* to be filed. *In re Connecting Railroad*, 22.

The report of a road jury, awarding damages, will not be confirmed where it appears from the evidence that there is no title to the property assessed in the person to whom the damages are awarded. *Ibid.*

ROADS.

There is no limitation as to the time of applying for viewers upon opening a road. *In re Chew Street*, 19.

By the supplement to the act incorporating the Connecting Railway Company, there is no right of appeal from the award of a jury to assess damages for lands taken. The remedy is by exception. *Turner v. Connecting Railway Co.*, 27.

SALE.

Sale of a ward's real estate by the guardian requires the sanction of the court of the county where the land is situate. *Packer's Estate*, 5.

If the purchaser at a receiver's sale fail to pay, the receiver must pursue the legal remedies; the court will not instruct him. *Givin v. Givin et al.*, 43.

SALE UNDER WILL.

A power of sale given to executors is given *virtute officii*, and survives to administrators *de bonis non cum testamento annexo*. *Chew v. Evans*, 163.

SCIRE FACIAS.

A *scire facias* is no more than a judicial writ, which lies only where the record remains. *Huston v. Donnelly*, 349.

SITUS.

Though promissory notes be drawn, dated, signed and endorsed at Philadelphia, where the drawer and endorser resided, yet if they were delivered and discounted at New York, the *situs* of the transaction is in the latter place. *In re Peter Conrad, Bankrupt*, 384.

SPECIFIC PERFORMANCE.

Where there is an agreement to purchase real estate, and there is a slip in the time for payment, equity abhors a forfeiture when the case admits of compensation. *Greaves v. Gamble*, 1.

STAMPS.

U. S. revenue stamps upon the probate of a will, should be affixed according to the value of the estate passing to or under the control of the executor, and not upon the value of the whole estate. *In re Stamping Letters Testamentary*, 67.

STATUTES.

See ACT OF ASSEMBLY.

STAUTE OF FRAUDS.

There are certain classes of cases where the promise to pay the debt of another need not be reduced to writing. *Henring & Co. v. Dittman*, 304.

STREETS.

Where the entire damages were laid upon the City of Philadelphia, for the unnecessary widening of a street already opened, the report of the jury was set aside. *In re Powelton Avenue*, 113.

The lines of unopened streets in the city of Philadelphia may be altered, subject to the approval of the Court of Quarter Sessions. *In re Thirty-fourth Street*, 129.

An illegal appropriation of a public street is a nuisance *per se*, and may justly be regarded a purpresture. *City v. The Railway Co.*, 163.

Contracts for paving streets in the city of Philadelphia must be awarded to the person selected by a majority of the property owners, along the streets to be paved. *Kesly et al. v. Dickinson et al.*, 257.

An injunction restraining the temporary blocking up of certain streets of the city of Philadelphia, by hauling bulky articles over them, was dissolved. *Passenger Railway Co. v. Morris*, 195.

The city of Philadelphia and the passenger railway companies are both liable in damages for neglect to repair the streets, over which the railway tracks are laid. *City v. Weller*, 400.

Cleaning of the streets of the city of Philadelphia is not "a public work erected or in progress of erection" in the contemplation of the act of Assembly forbidding courts to interfere by injunction with the erection or use of such public works. *Sewerage Co. v. Board of Health*, 402.

SUFFRAGE.

The constitution of Pennsylvania does not confer the right of suffrage upon women. *Burnham v. Lanning et al.*, 411.

The elective franchise in Pennsylvania is exclusively regulated by the constitution of the State. *Ibid.*

SUIT.

A suit is any proceeding in a court of justice, by which an individual pursues that remedy which the law affords him. *White v. The City*, 140.

SUNDAY.

The work of shaving customers by a barber, is not such a work of necessity as exempts it from the operation of the act of Assembly of 22d April, 1794, prohibiting work on Sunday. *Commonwealth v. Jacobus*, 491.

TAX.

The State of Pennsylvania cannot tax national bank stocks, at a higher rate than that imposed on other moneyed capital in the hands of individual citizens. *Pleish v. Hartranft et al.*, 46.

The act of Assembly of 22d December, 1869, imposing such higher rate, is unauthorized. *Ibid.*

TAX.—Continued.

Churches, meeting houses, or other regular places of stated religious worship, are exempt from taxation, though held by the congregation on lease. *Howell et al. v. The City*, 242.

No proof of notice to the owner appearing in the proceedings, a judgment upon a city claim for taxes is void. *City v. Vandevier*, 397.

A subsequent owner and occupier is liable for a former owner who has neglected to pay his taxes. *Niver v. Perigo*, 462.

An assessment is not for all purposes a *levy* of taxes; the former is a valuation for fixing the proportion to be paid; the latter is the act of imposing the proportion thus fixed. *Ibid.*

The capital stock of national banks is liable to taxation for county purposes. *Everett v. Steele et al.*, 470.

The exemption from taxation of mortgages and other moneyed investments in particular counties, does not relieve national bank stock from county taxation. *Ibid.*

It is liable to assessment at its actual or current value. *Ibid.*

In estimating the ratable value of real estate, the assessor should include coal breakers, houses, machinery, and other improvements, whether they be erected by the landlord or tenant. *Gorrell et al. v. Murphy et al.*, 495.

A bill in equity will not lie to restrain the collection of taxes alleged to be illegally assessed. The remedy is by an appeal from the assessment. *Ibid.*

TAXATION OF COSTS.

Under the equity rules of the Supreme Court of Pennsylvania, no allowance will be made in the taxation of costs, for printing examiners' reports. *Rogers v. Williams et al.*, 418.

TIME.

Where there is an agreement to purchase real estate, and there is a slip in the time for payment, equity abhors a forfeiture when the case admits of compensation. *Greaves v. Gamble*, 1.

A three months' notice to quit March 25th is in time if served December 25th previous. *Ogden v. Duffy*, 4.

Whenever an act is required to be done within a certain number of days, the day of the act must be excluded, and the count of time begins upon the next day. *Snyder v. Smith et al.*, 38.

A lien filed upon December 2d for a claim dated June 2d is within the six months, required by the mechanics' lien law, the first day being excluded and the last day included in the six months. *Ealer v. Peterson*, 303.

In computing the sixty days within which an offer of sale was to be accepted, the day of the date of the offer is to be excluded. *Serrill v. Burk*, 489.

TRADE MARK.

A person may lawfully make any article known to commerce, which is unpatented, but he may not apply another person's trade mark to such article. *Gillit v. Hall*, 124.

A name has for certain purposes a commercial value. *Ibid.*

TRESPASS.

Trespass *quare clautum fregit* is a cause of action which survives against executors and administrators. *McCallion v. Gegan*, 414.

TRUSTEE.

A trustee is bound to keep up insurances which were on the property when it came into his hands. *McNickie v. Henry*, 416.

TRUST.

A resulting trust is raised only from fraud in obtaining title or from payment of purchase money when the title is acquired. *Whetham v. Clyde*, 53.

Under the act of Assembly of April 23d, 1856, all trusts must be created by writing except trusts arising by construction or implication of law. *Ibid.*

A trust by implication or construction is raised only from fraud in obtaining the title or from payment of the purchase money when the title is acquired. *Danaisen v. Miller*, 215.

A special trust to an executor to hold personal property for the use and support of a married woman, gives him the right of possession, subject to payments for her support as provided for in the will. *Couller et al. v. Bortner et al.*, 505.

The *cestui que trust* was not bound to acquiesce in an illegal conversion by the trustee of the personal into real estate. *Ibid.*

TRUST.—Continued.

If a party who sets up a resulting trust, made no payment, he cannot be permitted to show by parol proof that the purchase was for his benefit or on his account. *Squires v. Ridgeway*, 510.

A trust cannot be alleged to have been created by the acts of an agent unless it be averred and shown that the consideration was paid by the alleged principal. *Ibid.*

TURNPIKE COMPANIES.

In an inquisition concerning a turnpike company, the fact that the jurors have paid toll to the company, is not a disqualification. *In re Turnpike Co.*, 252.

Where the company has received notice of the proceedings, and its superintendent appeared at the hearing, it cannot be objected that the proceedings were *ex parte*. *Ibid.*

An injunction to restrain a turnpike company from continuing toll houses was refused because the toll houses had been legally erected and if there was any damage from their continuance, the plaintiff had an adequate legal remedy. *Hammersley et al. v. Turnpike Co.*, 343.

USURY.

Frommlassory notes, though drawn, dated, signed and endorsed at Philadelphia, where the drawers and endorsers resided, yet if they be delivered and discounted in New York, at rates of interest usurious in the latter place, are void. *In re Peter Conrad, Bankrupt*, 281.

VESTED INTERESTS.

The Legislature cannot reform a will, so as to divest the rights of heirs under the intestate law. *Alter's Estate*, 72.

Where there is bequest to grandchildren, limited after an estate for life, both interests vest at the same time. *Provencher's Estate*, 68.

VESTED REMAINDER.

In cases of doubtful construction, the law leans in favor of a vested rather than a contingent remainder. *Cresson's Estate*, 219.

WIDOW.

See also **DOWER**.

Property bequeathed by a testator to his widow vests in her upon her husband's death. The profits whatever they may be, belong to her. *Buid's Estate*, 226. Where the widow has a life-interest in the personal estate of a testator, she is entitled to retain possession of such personal estate, upon entering into such security as the court may approve. *Ibid.*

The widow of a decedent is entitled to the mansion house for life. *Kline's Estate*, 428.

The inquest in partition must include the mansion house. *Ibid.*

Where the widow of a testator elects to take under his will, bequeathing his personal property equally to her and his son, she cannot claim as widow additional effects to the value of \$300. *Maier's Estate*, 475.

The widow can only recover her distributive share out of the personal effects of which her husband was possessed at the time of his death, remaining after paying his debts. *Parthimer's Estate*, 478.

She cannot claim a share in a valid *donatio causa mortis*. *Ibid.*

The fund in the hands of the widow, arising from the conversion of her share of the land of the decedent by proceedings in partition, is still treated as land, of which she is tenant in dower. *Snyder's Estate*, 481.

WILLS.

See also **CONSTRUCTION OF WILLS**.

Mere infirmities of age will not prevent a man from making a valid will. *Woodfall's Will*, 66.

To admit a will proved in New York to probate in Pennsylvania, the certificates of the surrogate and of the clerk of his court to the correctness of the record, is all that is necessary. *Kennedy's Will*, 70.

Where a husband and wife made separate wills and in mistake each signed the other's will, the Legislature has no power to authorize the admission of either will to probate. *Alter's Estate*, 72.

A memorandum not purporting to be a will, but containing dispositions of personal property, was refused probate, where there was a will legally executed, bequeathing all of the testator's property and which had not been revoked. *Florance's Will*, 85.











